NO. 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

ELMER W. HENDERSON, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and SOUTHERN RAILWAY COMPANY, *Appellees*.

On Appeal from the United States District Court for the District of Maryland.

BRIEF FOR ELMER W. HENDERSON.

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OPINIONS BELOW.

The opinions of the United States District Court for the District of Maryland are reported in 63 F. Supp. 906 and 80 F. Supp. 32 and appear in the record at pages 63 and 248. The appellant prosecutes this appeal from the decree entered on October 28, 1949. Probable jurisdiction was noted March 14, 1949 (R. 278).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1253 of the Judicial Code, 28 U.S.C. Sec. 1253.

STATUTES.

The pertinent portions of the Interstate Commerce Act are reproduced in the Appendix hereto.

STATEMENT OF THE CASE.

On May 17, 1942, the appellant, a Negro first-class interstate passenger on a train operated by the Southern Railway Company, a common carrier subject to the provisions of the Interstate Commerce Act, proceeding from Washington, D.C. to Atlanta, Georgia, was refused service at the two tables allegedly reserved for Negro passengers in the dining car of said train. At the time the appellant first requested service there were vacant seats at the tables allegedly reserved for Negroes. The other seats at these two tables were occupied by white passengers. There were vacant seats at other tables in the dining car, during the period when the appellant requested service. Appellant was refused service at the vacant seats at the tables allegedly reserved for colored passengers, although white passengers were continuously seated and served as vacancies occurred. He and other Negro passengers were not permitted to be seated and served at any other table in the dining car when there was a vacancy. As a result, he was never seated or served.

The Interstate Commerce Commission found that the appellant was subjected to undue and unreasonable prejudice and discrimination, concluded that the entry of an order for the future would serve no useful purpose, and dismissed the complaint.

The District Court for the District of Maryland set aside the order of the Commission and remanded the case, holding that racial segregation of interstate passengers is not *per se* forbidden by the Constitution, the Interstate Commerce Act or any other act of Congress; that the regulation, although not promulgated by the Interstate Commerce Commission, was directly approved by it, as a result of its

decision and order, and, for the purposes of the case, is treated as, in effect, the Commission's rule; that the Commission's finding of a violation of section 3(1) of the Act is correct; that the Commission erred in holding that "the defendant's practice as evidenced by its current instructions will result in no substantial inequality of treatment as between Negro and other passengers seeking dining car service"; that the current regulation, as construed by the Commission, does not constitute equality of treatment, for "if white passengers are thus seated at tables reserved for colored passengers, equality of treatment requires that a colored passenger subsequently applying for service should be seated at any available vacant seat in the dining car, either in the compartment reserved for colored passengers or if none, then elsewhere in the dining car". On February 8, 1946 the case was remanded to the Commission for further hearing. (R. 79).

Subsequently the Southern Railway promulgated new regulations (R. 233) reserving one table exclusively for colored passengers and the remaining tables exclusively for white passengers. This table is located next to the kitchen, opposite the steward's office, and is separated from the body of the dining car by a five foot wooden partition. On rehearing, the Commission found that the carrier's rules, based on the volume of traffic, "provided an equitable and reasonable division between the races of its available dining car space" (R. 9); that the current regulation is not shown to be violative of section 3, or of any other provision of the act (R. 10); that an order for the future is not necessary; and by its order of September 5, 1947, dismissed the complaint. An appeal from this order was taken to the District Court of the United States for the District of Maryland, which Court on October 28, 1948 dismissed the appeal. It is from this decree that the present appeal is taken.

ASSIGNED ERRORS RELIED UPON.

The United States District Court for the District of Maryland erred:

1. In approving the Commission's findings and conclusions that the carrier's regulations provided an equitable division between the races according to their numbers of the available dining car space and does not violate any section of the Interstate Commerce Act. (Assignment of Errors Nos. 2, 3 and 6, (R. 267)).

2. In concluding that the current amended carrier regulation is not discriminatory as to Negro interstate passengers and affords equality of treatment to each individual passenger, notwithstanding, in its application, any passenger may be refused available accomodations solely because of his race. (Assignment of Errors Nos. 5, 7, 8, 13, 15 and 21, (R. 267-268)).

3. In concluding that racial segregation of interstate passengers by a carrier subject to the Interstate Commerce Act is permissible under the Act, the Constitution of the United States and laws of the United States, as interpreted by this Court. (Assignment of Errors Nos. 3, 10, 11, 14, and 25, (R. 267-269)).

4. In failing to hold that segregation of interstate passengers, by a carrier subject to the Interstate Commerce Act, is a violation of rights of passengers protected by the Interstate Commerce Act, the Constitution, and laws of the United States. (Assignment of Errors Nos. 19, 20, 22, and 23, (R. 268)).

5. In failing to hold that failure of the Commission to declare the regulation a violation of the Interstate Commerce Act and to forbid its enforcement in the future is a violation of the Interstate Commerce Act, and the 5th Amendment to the Constitution and is contrary to the national transportation policy of the United States and the

public policy of the United States against discriminations and distinctions based solely on race or color. (Assignment of Errors Nos. 12, 17, 18, 24, 26, 27, 28, and 16, (R. 268-269)).

QUESTIONS PRESENTED.

1. Whether an interstate carrier regulation requiring segregation of passengers, solely according to race or color, violates the Interstate Commerce Act.

2. Whether failure of the Commission to declare the regulation unlawful and to forbid its enforcement in the future and dismissal of the complaint by the Commission and Court below:

(1) violate the Fifth Amendment to the Constitution,

(2) are contrary to the national transportation policy of the United States and are contrary to the public policy of the United States.

3. Whether segregation solely according to race is discrimination, in violation of the Interstate Commerce Act and the Constitution of the United States.

SUMMARY OF ARGUMENT.

Freedom from distinction based solely on race or color is a fundamental right inherent in the concept of liberty, as expressed in the 5th and 14th Amendments to the Constitution. An interstate carrier, subject to the provisions of the Interstate Commerce Act, is under a duty at least as exacting as that of a state to respect this immunity and has no right to limit passenger's freedom of choice of dining car accommodations and of association solely on the basis of race or color. The enforced separation of Negro passengers from all other passengers is unjust discrimination and refusal of service to any passenger at any vacant seat, solely because of his race or color, is inequal-

ity of treatment, notwithstanding it is indiscriminately imposed, in violation of section 3(1) of the Interstate Commerce Act. Enforced racial segregation of passengers by carrier regulation does not promote the comfort and convenience of passengers and cannot be justified as an attempt to preserve peace and good order. Race or color is an invalid basis of classification of passengers and a carrier regulation differentiating in facilities provided passengers solely according to their race is unreasonable on its face and in its application, in violation of section 1(4) of the Act.

The ruling of the Interstate Commerce Commission is based on testimony concerning volume of traffic, by race of passengers, which was irrelevant to the issue of the personal rights of the appellant to be accommodated without discrimination or distinction solely because of his race or color. The long-continued practice of the Commission has been approval of racial segregation by interstate carrier regulation although the Act confers no power upon a carrier to differentiate between its passengers solely because of race. By its action, the Commission has sanctioned the carrier's practice and has enforced a substantive rule of statutory interpretation which makes race or color the sole controlling factor in its application. The Commission has the power to prohibit racial segregation of passengers by interstate carriers notwithstanding this is one practice not specifically forbidden by Interstate Commerce Act.

In failing to order the carrier to cease and desist the enforcement of its regulation, it has failed to perform its duty under the Act and the Constitution, to protect the statutory and constitutional personal rights of passengers, in violation of the due process clause of the 5th Amendment. There is a public interest, over and above that of the appellant, in the removal of racial distinctions and discriminations by the Commission, as an agency of the Federal government, in a matter under its supervision and control.

The decision of the Commission and the court below were based on the erroneous assumption that racial segregation is not a violation of the Interstate Commerce Act or the Constitution. The Commission relied on *Chiles* v. *Chesapeake and Ohio Ry. Co.*, decided prior to the Interstate Commerce Act, which held that an interstate carrier regulation requiring racial segregation of passengers was reasonable, if tested by custom, usage, and tradition, the test employed to determine the reasonableness of a statute applicable to intrastate passengers in *Plessy* v. *Ferguson*. Whether the Court, in *Plessy* v. *Ferguson* considered racial segregation permissible and reasonable under the due process or the equal protection clause of the 14th Amendment, the error of its ruling is plain when considered in the light of subsequent decisions in which the Court has ruled that race or color bears no reasonable relation to any permissible governmental end and cannot be made the basis of classification of persons. These cases cannot be reconciled with subsequent decisions and insofar as they are applicable to this case, should be re-examined and overruled.

Segregation is discrimination, not only because inequality invariably accompanies segregation but because of the very idea of separateness. Separateness through enforced segregation destroys for millions of Americans their moral stamina and their faith in the American ideal because it is antithetical to the basic concepts of life, liberty, and the pursuit of happiness.

Racial segregation of interstate passengers enforced by states is unconstitutional under the commerce clause of the Constitution which requires a uniform rule for seating arrangements in interstate commerce. Enforced racial segregation by carrier regulation is contrary to the national transportation policy of the United States and since states cannot regulate the subject and Congress has not acted, a privately owned public carrier should not be permitted to regulate a matter when only Congress is authorized and competent to act.

ARGUMENT.

I. Freedom From Distinctions Based Solely on Race or Color is a Right Protected by the Constitution of the United States and the Interstate Commerce Act.

A. The nature of the right.

The Declaration of Independence states "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness". It has been said that the Constitution is the body and letter of this declaration of principles and it is in its thought and spirit that the Constitution should be read. *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150. In the American concept of democracy we cherish and foster individual freedom and human dignity, and we emphasize opportunity for each man according to his ability, regardless of national origin, religious belief, the size of his purse, or the color of his skin. These we consider to be arbitrary factors of no significance in a nation in which we express our pride as the melting pot of the world.

Our Constitution guarantees that each individual shall enjoy liberty and that no government shall deprive him of that liberty without due process of law. Though no attempt has been made to define the freedoms and immunities implicit in this concept, this Court has said:[1]

> The "liberty" mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will, to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which

[1] *Allgeyer* v. *Louisiana*, 165 U. S. 578.

> may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

In the American heritage, which emphasizes individual freedom and seeks a warrant for its expression rather than a justification of its limitation, the concept of "liberty" as it appears in the 5th and 14th amendments should be given the broadest scope. It has been said:[2]

> The liberty of which the 14th Amendment forbids a state from depriving anyone without due process of law is something more than freedom from the enslavement of the body or from physical restraint. In my judgment the words "life, liberty, or property" in the 14th Amendment should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of due process of law.

The liberties protected by the due process clause of the 5th and 14th Amendments are, of course, not entirely unrestrained. Liberty of action and expression is not unlimited. Even the fundamental freedoms of speech, press and religion are subject to curtailment when exercised beyond the boundaries of peaceful expression, by violence, to injure others, or to threaten opposition to our government and hamper its operations in time of war. Liberty of action is sometimes of necessity subject to restraints required for the protection of society.[3] Where a wide variety of rights have been asserted and the restraint challenged as a deprivation of liberty under the due process clause, the statutes were held justified because their purpose was considered essential to the public safety, health, morals, peace

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[2] Justice Harlan, dissenting in *Taylor* v. *Beckham*, 178 U. S. 548.

[3] For example, statutes have been upheld, as a valid exercise of police power, which imposed certain conditions to be complied with before the issuance of a liquor license, *Crowley* v. *Christensen*, 137 U. S. 86, which prohibited the transportation of lottery tickets in interstate commerce, *Champion* v. *Ames*, 188 U. S. 321, and which required persons to submit to vaccination, *Jacobson* v. *Commonwealth of Massachusetts*, 197 U. S. 11.

or prosperity, and the exercise of the liberty of action asserted was contrary to that interest sought to be protected.

On the other hand, prohibitory legislation has repeatedly been held a denial of due process of law because unnecessary, where the denial of liberty involved was that of engaging in a particular business;[4] teaching a foreign language:[5] the right of "parents and guardians to direct the upbringing and education of children under their control", in schools of their own choice,[6] and to direct that education with "reasonable choice and discretion in respect of teachers, curriculum and text-books;[7] the right of children to "obtain instruction deemed valuable by their parents and which is obviously not in conflict with any public interest";[8] the right of aliens to work without restrictions on the number an employer may hire;[9] to make and perform contracts;[10] and to maintain business books in one's native language.[11] These merely suggest the wide scope of rights embraced within the meaning of liberty secured by these amendments. This Court has said:[11a]

> Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. *It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others.* [Emphasis added.]

Restraints imposed upon freedom of choice of accommodations solely upon the basis of race or color are in no sense essential to the equal enjoyment of the right of choice of any other passenger. To afford a Negro passenger the right to sit at any available table of his choice hampers the

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4 *Adams* v. *Tanner*, 244 U. S. 590.
5 *Meyer* v. *Nebraska*, 262 U. S. 390, 391.
6 *Pierce* v. *Society of Sisters of the Holy Names*, 268 U. S. 534.
7 *Farrington* v. *Tokushige*, 273 U. S. 234, 298.
8 *Ibid.*
9 *Truax* v. *Raich*, 239 U. S. 33, 41.
10 *Allgeyer* v. *U. S.*, 165 U. S. 578.
11 *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 525.
11a *Crowley* v. *Christensen*, 137 U. S. 86.

right of choice of a white passenger no more than the competing right of other passengers of his race seeking service at the same time. The only condition essential to the equal enjoyment of the same right of choice by each passenger is that each shall await his turn and be served in that order. All that any passenger can require is that he be allowed to assert the right. That his prejudice toward the race of his fellow diners may hinder a passenger's enjoyment psychologically is immaterial. The point is that each passenger is entitled to diner service on a basis of indiscriminate equality without distinction as to race or color. The right here asserted is not that of "dictating" the particular seat or section where a passenger shall be served, as the Commission says no passenger has the right to do. *Brown* v. *Atlantic Coast Line Ry. Co.*, 256 I. C. C. 681, 692. Nor is the right involved "in its essence a social question" as the Commission views it. *Ibid.* at 695. There are, of course, privileges which may be accorded at the absolute whim of members of a social group. The carrier, however, is no social arbiter. Factors forming the basis for creation of social groups bear no relation to the use of carrier facilities in common by the public. Whether a passenger wishes to dine at the same table with a person who is not acceptable to him socially is a matter purely personal to him, and he is free to decline to do so. But, unlike his personal prerogative in private social groups, no passenger has the right to dictate with whom he will share public facilities, no more than he has a right to demand that others be deprived of their constitutional rights. *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

There is a right, social in nature, involved, however, in the enforcement of a rule which requires that passengers be served separately according to their race or color. In our democratic society each individual has, and must have, the right to choose his friends and to determine the course of his personal and family life. Choice of those persons with whom an individual wishes to associate is his personal

privilege, which may be exercised freely with even the utmost unfounded prejudice. If, however, a passenger, other than a Negro, wishes to dine with a person of the Negro race, the carrier absolutely restricts that freedom of association. Instances are not unknown where persons related by blood or marriage have been denied service together because, in fact or in the opinion of the carrier's agents, they were of different color or racial identity. This limitation imposed on one's personal liberty, by a statute requiring racial segregation of intrastate passengers, was recognized by Mr. Justice Harlan, in his dissenting opinion in *Plessy v. Ferguson*, 163 U. S. 537, at p. 557:

> The fundamental objection therefore, to the statute, is that it interferes with the personal freedom of citizens. "Personal liberty", it has been well said, "consists in the power of changing situation, or removing one's person to whatever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Comm. *134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

Freedom from distinctions based solely on race, particularly from segregation according to race, by persons of all races, is a fundamental right inherent in the concept of "liberty", as expressed in the 5th and 14th Amendments as are other rights not specifically enumerated therein. Certain freedoms and immunities are protected from invasion by the federal government by the Bill of Rights and are likewise given protection against state action under the due process clause of the 14th Amendment, though no specific prohibition is therein expressed, because of their

"fundamental" nature.[12] Among these fundamental personal rights and "liberties" given this dual protection are freedom of speech and press;[13] freedom of religion;[14] freedom of assembly;[15] the right to counsel when charged with a serious crime, when necessary to an adequate defense;[16] the right of one accused of a crime to be informed of the charge;[17] the right to just compensation for private property taken by eminent domain;[18] freedom from self-incrimination through coerced confessions;[19] and from official threat of violence.[20]

The scope of the rights embraced within the freedoms given this protection, particularly those guaranteed by the First Amendment, has enlarged progressively as this Court has been called upon to decide whether a particular right asserted lies within the boundaries. Illustrative are the right to picket peacefully;[21] the right to distribute pamphlets and leaflets;[22] freedom from postal censorship;[23] the

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12 There is considerable authority for the view that these rights secured by the first eight amendments are protected against state action, not because of their nature, but because it was the intention of the framers of the 14th Amendment that the Bill of Rights be made applicable to state action. See dissenting opinion of Mr. Justice Black in *Adamson* v. *California*, 332 U. S. 46. Other rights conceived to be "fundamental" are the right of employees to organize and choose their representatives [*N. L. R. B.* v. *Jones and Laughlin S. Corp.*, 301 U. S. 1]; the normal right of employers to select and discharge employees [*Adair* v. *U. S.*, 208 U. S. 161]; the right of employers to hire persons without restriction as to their citizenship [*Truax* v. *Raich*, 239 U. S. 33]; the right of an employer to organize his business and select his officers and agents [*N. L. R. B.* v. *Jones and Laughlin S. Corp.*, *supra*]; and the right to equality of treatment under the Interstate Commerce Act [*Mitchell* v. *U. S.*, 313 U. S. 80].

13 *Gitlow* v. *N. Y.*, 268 U. S. 652; *Stromberg* v. *California*, 283 U. S. 359; *Grosjean* v. *American Press Co.*, 297 U. S. 333.

14 *W. Va. Board of Education* v. *Barnette*, 319 U. S. 624.

15 *DeJonge* v. *Oregon*, 299 U. S. 353; *Hague* v. *C. I. O.*, 307 U. S. 496.

16 *Uveges* v. *Commonwealth of Pennsylvania*, 335 U. S. 437.

17 *Snyder* v. *Massachusetts*, 291 U. S. 97.

18 *Chicago, B. & Q. Ry. Co.* v. *Chicago*, 166 U. S. 226.

19 *Chambers* v. *Florida*, 309 U. S. 227.

20 *Brown* v. *Mississippi*, 297 U. S. 278.

21 *Thornhill* v. *Alabama*, 310 U. S. 88.

22 *Schneider* v. *State*, 308 U. S. 147; *Lovell* v. *Griffin*, 303 U. S. 444.

23 *Hannegan* v. *Esquire*, 327 U. S. 146.

right to use loudspeakers in a political campaign;[24] and the right to decline to give a flag salute.[25]

The latitude of action permissible in exercising the freedoms specifically guaranteed by the First Amendment indicates the scope of constitutional protection, for notwithstanding the Constitution does not spell out every right it protects, this Court has said it is particularly mindful it is "a constitution we are expounding".[26] Those constitutional provisions for the security of person and property are likewise to be liberally construed. *Boyd* v. *U. S.*, 116 U. S. 616.

Liberty of expression is abridged when its assertion in an appropriate place is denied "on the plea that it may be exercised in some other place". *Schneider* v. *State*, 308 U. S. 147, 163. Freedom of choice of accommodations is abridged when the choice is confined to one inferior table. Certainly it cannot be said that in the limited confines of a dining car, one table, set apart from the body of the car, for Negro passengers is the only appropriate place for them to dine. Freedom of discussion is considered so vital that the community cannot substitute its judgment for that of individual members of the community whether a message borne by another shall be received. *Martin* v. *City of Struthers*, 319 U. S. 141, 143. Many persons may be glad to receive it and the community must accord to each member "the full right to decide" whether he wishes to receive the visitor at his home. *Ibid.* No reason is perceived why a carrier may substitute its judgment for that of individual passengers as to the table at which he may dine and with which passengers he may be seated. Certainly full freedom of expression cannot exist when one is free to associate only with members of one's own race or color. A carrier should not be permitted to substitute its judgment for that of its passengers. It has no right, superior to that

[24] *Saia* v. *New York*, 334 U. S. 558.

[25] *West Va. Bd. of Education* v. *Barnette*, 319 U. S. 624.

[26] Mr. Justice Frankfurter, concurring opinion in *Adamson* v. *California*, 332 U. S. 46, 66.

of the passengers, to dictate that passengers of one race shall be accommodated at one segregated table and served only in the company of members of that race, while passengers of all other races may dine at any other table of their choice and with whom they please—except Negro passengers. A State may not confine Negro residents to areas where all or a majority of the other residents are Negroes, the only persons whom the State considers appropriate as neighbors. *Buchanan* v. *Warley*, 245 U. S. 60. Nor may a State or Federal judiciary enforce a private covenant expressing the judgment of individual persons that it is inappropriate or undesirable that Negroes purchase or occupy certain property in a particular area. *Shelley* v. *Kraemer*, 334 U. S. 1; *Hurd* v. *Hodge*, 334 U. S. 24. Equality in the exercise of rights in real property is not afforded even where there exists the right of choice of some other property, which may be superior to the particular property desired. Equality is afforded only when any person has the right to choose a particular piece of property, to purchase, sell, or occupy as he sees fit, indiscriminately on the same basis with a person of another color. It is not the uniqueness of a particular piece of real property that is the controlling factor in the establishment of this principle. It is that race may not be made the basis for indiscriminate denial of the right of choice. Where even the controlling factor of race is absent, and an invasion of personal liberty is asserted, that right is so highly prized that stricter requirements of due process apply than when only property rights are concerned.[27] Equality of treatment is not achieved in the provision of separate facilities, however precisely duplicated. Declaring that passengers may use public facilities in common only with passengers of their race or color and confining Negro passengers to the use of inferior accommodations is a denial of equality of treatment notwithstanding the car-

[27] Mr. Justice Brandeis, concurring opinion in *St. Joseph Stock Yards* v. *U. S.*, 298 U. S. 38 at 77.

rier stands ready and does exclude all other passengers from the use of the table set aside for the exclusive use of Negro passengers. The inequality of treatment lies not only in the discrimination against Negro passengers—the intentional exclusion of persons of this race from the body of the car, to keep them to themselves, and placing them invariably at the most undesirable table. Denial of service to any passenger, whatever his race and solely because of his race, of available accommodations is discrimination. Equality of treatment, like equal protection of the laws, is not achieved when inequalities are indiscriminately imposed.

This Court has ruled that because of the nature of those rights guaranteed by the First Amendment and entitled to protection against both the federal and state governments, the burden rests upon the government to justify any invasion by a showing of clear and present danger. The sanction given them requires that the widest latitude of expression be given. They permit of no dubious intrusion: any impairment must be justified by the most compelling reasons. However subjective may be the process of determining the rights "implicit in the concept of ordered liberty and justice" and thus protected by the due process clause of the 5th and 14th Amendments, when the rights of minorities are concerned, whatever the *nature* of that right asserted, this Court has required the same showing of a weightier, countervailing public necessity to justify governmental action based solely on race, color, or national descent. In *Strauder* v. *W. Va.*, 100 U. S. 303, this Court stated (p. 306):

> The words of the [14th] amendment, it is true, are prohibitory, but they contain a necessary implication of a positive *immunity* or right, most valuable to the colored race—*the right to exemption from unfriendly legislation against them distinctively as colored; exemption* from legal discriminations, implying infe-

riority in civil society lessening the security of their enjoyment of the rights which others enjoy. [Emphasis supplied.]

If race, color, or national descent under the 14th and 5th Amendments, is constitutionally a neutral, irrelevant factor, one possesses an *immunity* from distinctions based solely on race, color, or national descent and these alone cannot be made the basis of governmental action in the absence of some compelling paramount public necessity which requires the distinction be made in order to protect the security of all.

That this immunity exists but is often infringed seems to have been recognized by this Court. In full recognition of its judicial function, this Court has fulfilled the necessity of a searching, judicial scrutiny of governmental action, disclaimed in the economic realm, where the constitutionality of commercial regulation is presumed,[28] to determine, where rights of minorities are concerned, if those rights have been denied, not only in express terms, but in substance and effect. *U. S. v. Carolene Products Co.*, 304 U. S. 144, 152, n. 4; *Oyama* v. *State of California*, 332 U. S. 633, 636; *Chambers* v. *State of Florida*, 309 U. S. 227. In the latter case, Mr. Justice Black, speaking for the Court, stated (p. 241): "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. . . No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." As in the case of freedoms secured by the First and 14th Amendments, where the restriction must be affirmatively

[28] *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 190-191.

justified by a significant public interest threatened by clear and present danger,[29] *discriminations* against racial minorities can be excused only by the "most exceptional circumstances".[30] *Distinctions* between persons solely because of race, color, or national descent, "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality",[31] can be justified only by "pressing public necessity",[32] such as security measures in time of war.

Upon subjective evaluation, there are compelling reasons for the similarity in the showing required to justify a restraint on freedom from distinctions of race or color and those freedoms guaranteed by the First Amendment. As to the latter, decisions of this Court show that there is a national interest in the free expression of speech, press and religion, over and above the importance of the freedom of its exercise to the individual. This was recognized by Mr. Justice Brandeis, when, speaking of freedom of discussion in *Gilbert* v. *Minnesota*, 254 U. S. 325, he stated (pp. 337-8): "Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the nation than it is to himself. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril". Eleven years later, Chief Justice Hughes, speaking for the Court, in *Stromberg* v. *California*, 283 U. S. 359, reiterated this principle, stating (p. 369): "The maintenance of opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic,

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29 *Thomas* v. *Collins*, 323 U. S. 516, 529.

30 *Oyama* v. *California*, *supra*, p. 646.

31 *Hirabayashi* v. *U. S.*, 320 U. S. 81, 100.

32 *Korematsu* v. *U. S.*, 323 U. S. 214, 216.

is a fundamental principle of our constitutional system." The democratic process thrives only where citizens are free to criticize their government, by spoken and printed word, and to discuss grievances and proposed remedies. The same objective is sought to be attained in the field of religious expression according to one's personal beliefs. Thus a board of education may not compel a flag salute when it is contrary to one's religious views. This Court has said of such boards: "That they are educating the young for citizenship is reason for scrupulous protection of the Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes". *West Va. Bd. of Education* v. *Barnette*, 319 U. S. 624. Protection of the right herein asserted—freedom from distinctions solely because of one's race or color—is rooted in the same democratic principles. If men are created free and equal, each person must be guaranteed the opportunity to participate in the mainstream of community and national life. The measure of freedom of any people is that of those persons who labor under the greatest restraints, for as long as one man is not free, none is free. We believe the reason this immunity must be protected to ensure that important principles of our democratic society become living law, rather than "mere platitudes", is well stated in The Report of the President's Committee on Civil Rights: "To Secure These Rights", and it is to secure the right asserted that protection is here sought. The Report states (p. 4):

> THE IDEAL OF FREEDOM AND EQUALITY
>
> The central theme in our American heritage is the importance of the individual person. From the earliest moment of our history we have believed that every human being has an essential dignity and integrity which must be respected and safeguarded. Moreover, we believe that the welfare of the individual is the final goal of group life. Our American heritage fur-

ther teaches that to be secure in the rights he wishes for himself, each man must be willing to respect the rights of other men. This is the conscious recognition of a basic moral principle: all men are created equal as well as free. Stemming from this principle is the obligation to build social institutions that will guarantee equality of opportunity to all men. Without this equality freedom becomes an illusion. Thus the only aristocracy that is consistent with the free way of life is an aristocracy of talent and achievement. The grounds on which our society accords respect, influence or reward to each of its citizens must be limited to the quality of his personal character and of his social contribution.

This concept of equality which is so vital a part of the American heritage knows no kinship with notions of human uniformity or regimentation. We abhor the totalitarian arrogance which makes one man say that he will respect another man as his equal only if he has "*my* race, *my* religion, *my* political views, *my* social position." In our land men are equal, but they are free to be different. From these very differences among our people has come the great human and national strength of America.

Thus, the aspirations and achievements of each member of our society are to be limited only by the skills and energies he brings to the opportunities equally offered to all Americans. We can tolerate no restrictions upon the individual which depend upon irrelevant factors such as his race, his color, his religion or the social position to which he is born.

B. The duty of the carrier to protect this right.

Neither the Constitution nor the Interstate Commerce Act confers upon the carrier any right to differentiate between its passengers solely on the basis of race. On the contrary, whatever differentiation the carrier is permitted to make in facilities provided, based on relevant differences such as ability and willingness to pay, it cannot be said that Congress intended to authorize the carrier to discriminate or differentiate between its passengers on the

basis of race. The carrier is invested with a public interest and performs a public function. For this reason its rights and duties are subject to limitations not applicable to the acts of an individual. Instead, its property and the function it performs are so impressed with a public interest that it may not operate its business "as freely as a farmer does his farm". *Marsh* v. *Alabama*, 326 U. S. 501, 506. It is because of the public nature of and public interest in public carriers, bridges, turnpikes and even privately owned towns that subjects them to regulation in the interest of the public and "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Ibid.*

Under the Railway Labor Act the carrier cannot interfere with the liberty of its employees in selecting representatives of their own choice. *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S.S. Clerks*, 281 U. S. 548, 571. If the carrier cannot interfere with this "fundamental" right, it should not be permitted to interfere with passengers' freedom of selection of accommodations and infringe their immunity from distinctions based solely on race or color. The same act which confers upon a union the power to represent a craft and to make contracts as to wages, hours, and working conditions, also imposes upon it the duty not to discriminate against those for whom it acts. *Steele* v. *L. & N. Ry. Co.*, 323 U. S. 192, 202. In the exercise of this power it may consider differences between workers in seniority, the type of work and competence with which it is performed but it cannot differentiate between those whom it represents on the basis of race because, unlike those relevant differences mentioned, race alone is "obviously irrelevant and invidious". 323 U. S. at 203. A carrier may consider such relevant differences between passengers as ability and willingness to pay for accommodations in determining where they shall be seated

and may segregate a passenger because he has a contagious disease but, like a union, has no authority to promulgate regulations based solely on their race or color. A union exercising powers by virtue of a federal statute, as the carrier does by virtue of the Interstate Commerce Act, is held to "at least as exacting a duty to protect equally" those whose fundamental rights of employment it regulates as is imposed by the Constitution "upon a legislature to give equal protection to the interest of those for whom it legislates". *Ibid.* at 202. A carrier is likewise held to at least as exacting a duty in prescribing regulations affecting fundamental rights of passengers, under the Interstate Commerce Act. This Court has held that "denial of equality of accommodations" to a Negro passenger "because of his race would be an invasion of a fundamental individual right which is guaranfeed against state action by the Fourteenth Amendment" and "in view of the nature of the right" it is a denial by a carrier of equality of treatment under the Interstate Commerce Act. *Mitchell* v. *U. S.*, 313 U. S. 80, 94.

If the duty of a union under the Railway Labor Act or a carrier under the Interstate Commerce Act is equivalent to the duty of state under the 14th Amendment, each must respect the constitutional rights of those whose rights its action affects. See concurring opinion of Mr. Justice Murphy in *Steele* v. *L. & N. R. Co.*, *supra*, at p. 208. The powers of a carrier, at least, because of the nature of its business and the use of its property by the public, are circumscribed by the statutory and constitutional rights of its passengers. *Marsh* v. *Alabama*, 326 U. S. 501, 506. Whether a carrier's rights are circumscribed by all constitutional rights of its passengers, or only those according to their nature, it is clear that the carrier must provide equality of treatment to all. If equality of treatment is equivalent to equal protection of the laws, refusal of service to any passenger solely because of his race, is inequality of treatment, though indiscriminately imposed,

for equal protection of the laws is not satisfied when inequalities are indiscriminately imposed. *Shelley* v. *Kraemer*, 334 U. S. 1.

The carrier's practice is entirely voluntary. No state can compel it to segregate passengers according to race. *Morgan* v. *Virginia*, 328 U. S. 373. Certainly it could not seriously be urged that a statute requiring racial segregation which burdens commerce is nonetheless a reasonable exercise of state police power, especially when judged by such questionable criteria as the observable extent of racial differences, noted in *Plessy* v. *Ferguson*. The Carrier advances as its reason for the practice an attempt "to keep down friction" between the races (R. 167-169). This, in itself, is no justification for regulatory measures of the stature of legislative enactments, for "important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution". *Buchanan* v. *Warley*, 245 U. S. 80, 81. If the measure of duty of equality of treatment required of an interstate carrier is as exacting as that imposed upon a state, a carrier-made regulation, promulgated under the "convenient apologetics" of preservation of peace and good order which prescribes different treatment for passengers, solely according to their race or color, is a violation of that duty. Further, what is allowable in the reasonable exercise of state power may only suggest the minimum standard of conduct required of a carrier, and does not necessarily mark the limits of its duty, because of the sweeping prohibitions of the Interstate Commerce Act. Whether the carrier's duty extends to the protection of any constitutional rights, or only those rights of statutory creation, it has no right under the common law, the Constitution, or the Interstate Commerce Act, to differentiate in the facilities afforded for public use solely of the basis of race or color of its passengers.

II. Enforcement by An Interstate Carrier of Its Regulation Requiring Segregation of Passengers Solely According to Race or Color is a Violation of the Interstate Commerce Act.

A. The regulation violates Section 3(1) of the Act.

(1). *It unduly discriminates against particular persons.*

Over a period of years the Southern Railway has maintained a practice of segregating passengers according to race, which is enforced as to dining car service, here involved. In July 1941 its passenger department employees were instructed as follows:

> Dining Car Regulations
>
> Meals should be served to passengers of different races at separate times. If passengers of one race desire meals while passengers of a different race are being served in the dining car, such meals will be served in the room or seat occupied by the passenger without extra charge. If the dining car is equipped with curtains so that it can be divided into separate compartments, meals may be served to passengers of different races at the same time in the compartment set aside for them. (R. 66)

These instructions were supplemented on August 6, 1942, by the following, in effect at the time of the occurrence complained of:

> Effective at once please be governed by the following with respect to the race separation curtains in dining cars:
>
> Before starting each meal pull the curtains to service position and place a "Reserved" card on each of the two tables behind the curtains.
>
> These tables are not to be used by white passengers until all other seats in the car have been taken. Then if no colored passengers present themselves for meals, the curtain should be pushed back, cards removed and white passengers served at those tables.

After the tables are occupied by white passengers, then should colored passengers present themselves they should be advised that they will be served just as soon as those compartments are vacated.

"Reserved" cards are being supplied you. (R. 66-67)

The Commission's conclusion that the carrier's practice, as evidenced by the instructions foregoing would not "result in any substantial inequality of treatment as between Negro and other passengers seeking dining-car service" (R. 191) was held erroneous by the court below which ruled that substantial equality of treatment was not afforded to Negro passengers (R. 77). On rehearing, after remand, the carrier introduced in evidence the following regulation issued effective March 1, 1946:

To Passenger Conductors and Dining Car Stewards.

Consistent with experience in respect to the ratio between the number of white and colored passengers who ordinarily apply for service in available diner space, equal but separate accomodations shall be provided for white and colored passengers by partitioning diners and the allotment of space, in accordance with the rules, as follows:

(1) That one of the two tables at Station No. 1 located to the left side of the aisle facing the buffet, seating four persons, shall be reserved exclusively for colored passengers, and the other tables in the diner shall be reserved exclusively for white passengers.

(2) Before starting each meal, draw the partition curtain separating the table in Station No. 1, described above from the table on that side of the aisle in Station No. 2, the curtain to remain so drawn for the duration of the meal.

(3) A "Reserved" card shall be kept in place on the left-hand table in Station No. 1, described above, at all times during the meal except when such table is occupied as provided in these rules.

(4) These rules become effective March 1, 1946. (R. 7)

Formerly Negro passengers were forced to wait until passengers of all other races applying for service had been accomodated. During the war, the increase in travel necessitated continuous use of the dining cars, with the result that it was necessary to serve Negro passengers at the same time other passengers were being served. The carrier then initiated the use of curtains to separate two tables, conditionally reserved for Negro passengers, from the rest of the diner (R. 166-167). Recently it has installed five-foot wooden partitions (apparently to comply with a Virginia statute[33] which requires a partition) separating one table reserved for Negro passengers from the rest of the car, opposite which, in place of the other table formerly reserved for Negro passengers, it has located the Steward's "office". (R. 199)

Negro passengers are the only passengers who are confined to service at one table, behind a wooden partition, roped off like a stall until its occupants enter. Negro passengers are the only group of passengers who are limited to four in number for service at the same time, notwithstanding every other seat in the diner may be vacant. Negro passengers are the only passengers who must always sit at one table, next to the kitchen, where Negro passengers are invariably compelled to sit, with its clatter and traffic, and opposite the steward's "office" where waiters gather for supervision and change-making at the cash register, all in the narrow confines of this area. Yet passengers of all other races have the freedom of choice of accommodations at any other available table in the dining car, without these discomforts. This privilege, denied to Ne-

[33] Code of Laws of Virginia (1904), Chap. 155, Sec. 3962 reads:

Separate Cars for White and Colored Passengers.

All persons natural or artificial, who are now, or may hereafter be, engaged in running or operating any railroad in this State by steam for transportation of passengers are hereby required to furnish separate cars or coaches for travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial partition, with a door therein, shall be deemed a separate coach and each separate coach or compartment shall bear in plain letters, indicating the race for which it is set apart.

groes solely because of their race, is enjoyed by all other persons, as until recently was the right of choice in housing accommodations by persons other than Negroes, "as a matter of course". *Shelley* v. *Kraemer*, 334 U. S. 1. This practice, which is unduly prejudicial and disadvantageous to Negro passengers in many respects, as indicated, is certainly embraced within the sweeping provisions of Section 3(1) which this court has said is intended "to secure equality of treatment to all and to prevent unjust discrimination and the language of the act is comprehensible enough to include every form of unjust discrimination." *Chesapeake and Ohio R.R. Co.* v. *U.S.*, 296 U.S. 187. Further and fundamentally more important, the carrier's practice of segregating passengers according to race has consistently been directed exclusively against particular persons —Negro passengers—notwithstanding Section 3(1) specifically states that it is unlawful for any common carrier subject to the Act "to subject any particular person to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." In its regulations, the carrier successively refers to "passengers of different races" and to "white and colored passengers". Presumably passengers other than Negroes, such as Indians and Orientals are seated only at the segregated table, although this is highly unlikely. However, under the present regulation no passengers, white or colored—except Negroes—are forced to endure the humiliation, embarrassment and discrimination of being set off from fellow passengers as if they were inferior, loathesome untouchables and unfit to share public accommodations in the impersonal manner as other passengers. A single racial group is singled out for differentiation of treatment and, for this reason, the practice is "immediately suspect". *Korematsu* v. *U.S.*, 323 U.S. 214. We submit, therefore, that the carrier's practice, as evidenced on the face of its regulation and in its administration, is a denial of equality of treatment to Negro passengers and is unduly discriminatory in singling out these particular passengers for different treatment, solely because of their race.

(2) *The carrier's practice denies the personal fundamental right of equality of treatment of Negro and other passengers.*

Under the carrier's present regulation and practice 4 seats in the dining car are provided for Negro passengers and 40 for all other passengers. As shown by the carrier's testimony in the application of this regulation, no persons other than those identifying themselves as Negroes or so determined to be by the steward are permitted to be seated and served elsewhere in the dining car. Thus, if the reserved "Jim Crow" table is occupied, the 5th Negro is denied service, notwithstanding there may be vacant seats at other tables in the car. (R. 203) Likewise, the 41st passenger, other than a Negro, when all seats in the body of the car are occupied, will not be seated and served at a vacant seat at the reserved "Jim Crow" table. (R. 207)

In *Mitchell* v. *U.S.*, 313 U.S. 80, 97, in comparing equality of treatment under Section 3(1) of the act to that required of a state under the equal protection clause of the 14th amendment, the Court stressed the principle that "the essence of the constitutional right is that it is a personal one. It is the individual, we said, who is entitled to the equal protection of the laws—not merely a group of individuals, or a body of persons according to their numbers."

More recently, in *Shelley* v. *Kraemer*, 334 U.S. 1, in which it was urged that judicial enforcement of racial restrictive covenants was not a denial of equal protection of the laws because it applied equally to white and Negro persons, the Court ruled that "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." (P. 22)

The principle is applicable here. As shown above, instances may and do occur when a passenger may seek service but will be denied it even though there is a vacant seat. We believe the rule is correctly stated by Judge Soper, in the dissenting opinion below, that "a vacant seat may not

be denied to a passenger simply because of his race" (R. 264).

Appellant and other Negro passengers seek only the same treatment accorded all other passengers. Obviously no one can complain of a failure to be served when the diner is fully occupied but there is a significant difference between that situation and one where there are vacant seats and the carrier refuses to serve Negro passengers. The court below, however, failed to see that denial of service to any passenger solely because of his race "produces a result any more unjust or inequitable from a legal approach—which must be this Court's approach to the question—than the no doubt common situation where both white and colored passengers may be kept waiting to secure seats at tables alloted to their respective races, because, for the time being, every seat in the dining car may be occupied" (R. 260). Failure to serve a passenger when there is no space available infringes no passenger's rights. Then every passenger must wait, regardless of his race, but failure to serve one passenger and compelling him to wait until a particular table is vacant, while serving others whom he preceded to the dining car at a table he is not permitted to occupy, is an invasion of his personal right to equality of treatment. If one passenger may enter the diner and be served immediately while another passenger must wait until a certain table is available, the latter is not accorded treatment equal to that given the passenger preferred. The discrimination in this undue preference, we submit, is obvious.

It is the steward's duty to assign passengers to the tables designated for use according to the race of each passenger. It is his duty to use reasonable care in ascertaining the race of each passenger in assigning passengers. *Nashville, C & S Ry. Co.* v. *Cathey*, 4 Tenn. Civ. App. 346. Although some method of identification must be employed, as in the case of a statute,[33a] inasmuch as the regulation gives no directions to the steward in the ascertainment of race or color, and since there is no ascertainable stand-

[33a] *Morgan* v. *Virginia*, 328 U. S. 373.

ard generally applicable or made for the purpose of the regulation, the determination of each passenger's race rests entirely within the discretion of the steward and conductor. No dining car steward or conductor is capable of determining race. That is the specialized function of anthropologists who do not rest their conclusions on appearance alone, and who are not in complete agreement. The most a steward can do is form his opinion of a passenger's racial identity. The discrimination possible under these conditions is obvious. And, as pointed out by Chairman Aitchison, in his dissenting-in-part opinion, "Discrimination and prejudice will be the result of the uncertain guide afforded by the quoted words" (R. 11). If he forms his opinion of a passenger's racial identity on the basis of the definitions prescribed by statutes, with which the regulation is intended to comply, conceivably he might resort to the statute of the state through which the train is then passing. This would require interrogation of the passenger as to his ancestry to determine if under the statutory definition he is a Negro or "colored", for the steward has no means at hand for otherwise securing these pertinent facts. If he rests his opinion on skin color and general appearance, Negroes not so identifiable will be permitted to sit at the superior tables. Instances where this has happened, even to the extent of separating related persons, are not unknown.

B. The carrier's regulation violates Section 1(4) of the Act.

(1) *The reason for the regulation.*

Under Section 1(4) of the Act, it is the carrier's "duty . . . to provide reasonable facilities for the operation of through routes and to make reasonable rules and regulations with respect to the operation of through routes . . ." This is declaratory of the common law right and duty of a carrier to promulgate reasonable regulations necessary to the performance of its duties to the traveling public with the highest degree of efficiency, with a view to conserving the convenience, comfort and safety of its passengers. *Pa.*

Ry. Co. v. *Puritan Coal Mining Co.*, 237 U.S. 121; *Capital Traction Co.* v. *Morgan*, 44 App. D.C. 237; *Castell* v. *American Airways*, 88 S.W. (2nd) 976.

One of the first considerations in determining the reasonableness of a regulation is the carrier's reason for its promulgation. The carrier's vice-president testified that it was necessary to segregate the races "due to the temperamental people of the South; to help keep down friction; to keep peace and good order; that the seating of white and colored passengers together by the steward would create discord, probably end in a race riot before it was all over; that Negro passengers have filed practically all the lawsuits for mistreatment; that there has been an increasing number of lawsuits by colored passengers involving dining car facilities, due principally to the fact that colored passengers have insisted on going into the white compartment of the cars in violation of the Jim Crow laws" (R. 168-171). On rehearing before the Commission, he testified, with respect to the current regulation that "we found that this would meet the requirements of all of the states in which we operate where the segregation laws are effective" (R. 202), and "This is assigned space, and it is equally assigned to meet the requirements of the segregation laws" (R. 205).

Contrary to this testimony that allowing passengers of different races and color to sit where they please in the dining car would "create discord" and "probably end in a race riot", the evidence in this case shows that in actual practice, when segregation has not been enforced, no trouble of any kind has resulted. One of the carrier's witnesses, who unlike the vice-president has observed personally the conduct of passengers in the dining car, testified that he had often served white and colored passengers at the segregated "Jim Crow" table at the same time (R. 145); that "Quite often white people come and sit down with colored people" (R. 147); that he has seen colored persons sit down at the table with white passengers and

also white passengers seat themselves with colored persons (R. 148-149); that when the curtain was in use on the diner and passengers of different races were seated and being served at this table, the steward did not pull the curtain (R. 146); that the curtain was not drawn when colored soldiers sat at the table (R. 152); that he had seen both white and colored passengers push back the separating curtain, and could not recall having seen the steward draw it after passengers had pushed it back (R. 152-153); and that when colored and white passengers seated themselves at one table and were served by him, nothing happened and the steward did not interfere. (R. 148)

Notwithstanding preservation of the peace and good order is the carrier's alleged reason for enforcing racial segregation, the real reason is, as one must honestly admit, to keep Negroes to themselves. Mr. Justice Harlan, in his dissenting opinion in *Plessy* v. *Ferguson*, 163 U. S. 537, pointedly stated:

> Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of La. did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.

This Court on frequent occasions has summarily dismissed the argument that race friction makes it necessary to keep the races apart in order to preserve peace and good order. This objective, however desirable cannot be accomplished by enforced residential segregation. *Buchanan* v. *Warley*, 245 U. S. 60; *Harmon* v. *Tyler*, 273 U. S. 668; *City of Richmond* v. *Deans*, 281 U. S. 704. In

Oyama v. *California*, 332 U. S. 633, 650, Mr. Justice Black, in his concurring opinion spoke of the "uncompromising opposition of the Constitution to racism, whatever cloak or disguise it may assume." In the same case, Mr. Justice Murphy concurring stated at p. 663 that the Constitution "insists that government whether state or federal shall respect and observe the dignity of each individual, whatever may be the name of his race, the color of his skin, or the nature of his beliefs. It thus renders irrational as a justification of discrimination those factors which reflect social animosity."

(2) The regulation does not promote the comfort and convenience of passengers.

It has been held that the Interstate Commerce Act was enacted primarily, not for the benefit of the carrier, but to protect passengers. *Kentucky Bridge Co.* v. *Louisville R. Co.*, 37 F. 567; *Central R. Co. of N. J.* v. *Anchor Line*, 219 F. 716. The regulation here is, on the contrary, a burden on passengers and the carrier. In this case, as was the case in *Washington, B. & A. Electric Co.* v. *Waller*, 289 F. 598, there is no evidence that the regulation tends to promote the passengers' comfort, or preserve the public peace and good order. Nor is there any evidence that the regulation and practice were induced by the carrier's determination of the existence of such facts. On the contrary, the evidence shows no necessity to segregate passengers by race in order to keep the public peace. It shows that passengers of different races have voluntarily sat and eaten together but that the carrier's practice is to refuse service if there is no seat at a table at which the steward will assign the particular passenger. The fact shown that passengers have sat and eaten together without incident shows that they have no objection as to whom their fellow diners shall be, as indeed no passenger has a right to demand. These occurences can be enlarged. (R. 41-42.)

Notwithstanding passengers have seated themselves for service at any available seat, without regard to the race of fellow diners, the carrier's present practice is to refuse service in the diner to any passenger who applies at a time when all tables of those to which the steward will assign him are occupied. Denial of dining car service to any hungry passenger, when there is a vacant space, is of no benefit, comfort or convenience to him or to any other passenger, whatever his race, who is similarly treated.

There is no valid reason for the carrier's self-imposition of the practice of segregating passengers by race and the expense which it is incurring to install wooden partitions in each car. The result of this absurdity is that the carrier cannot make full use of facilities and passengers must ultimately bear the expense of a needless structure for which there has been no request and which is unwanted.

It is significant that Negroes have filed practically all suits against the carrier for mistreatment arising out of the enforcement of its regulations separating passengers by race. (R. 169) As far as it is ascertainable, every formal complaint filed with the Interstate Commerce Commission charging discrimination in dining car service has been filed by Negro passengers.[34] There have been presented to the Commission a considerable number of informal complaints and it is reasonable to assume that there are more Negro passengers whose rights have been infringed who have not complained.

The service provided Negro diners imposes discomforts, disadvantages, and inconveniences to which other passengers are not subjected. The present accommodations are more discriminatory than was the situation when

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[34] *Brown* v. *Atlantic C. L. Ry. Co.*, 256 I.C.C. 681; *Henderson* v. *Southern Ry.*, 258 I.C.C. 413; *LeFlore et al* v. *Gulf, Mobile & Ohio R. Co.*, 262 I.C.C. 403; *Barnett* v. *Texas & Pacific Ry. Co.*, 263 I.C.C. 171; *Mays* v. *Southern Ry. Co.*, 268 I.C.C. 352; *Byrd* v. *Seaboard Air Line R. Co.*, 269 I.C.C. 344; *Jackson* v. *Seaboard Air Line Ry. Co.*, 269 I.C.C. 399; *Stamps et al* v. *Louisville & N.R. Co.*, 269 I.C.C. 789.

the incident complained of occurred. At least under the former regulation, as construed by the Court below, a Negro passenger had the right to sit at any table in the dining car if the "reserved" table was occupied by persons of anothr race or color. (R. 77-78) Segregation is particularly a burden on Negro passengers. It often results in denial of service, and always means humiliation and embarrassment, the stigmatization of being classed as inferior and unfit to sit with passengers of other races. Segregation means for the Negro passenger, if he wishes to eat in the diner, submission to this degrading practice. Segregation means that Negro passengers, who are able, are forced to expend time and money to complain to the Interstate Commerce Commission, to file suits against the carriers, to wage the battle to enforce a simple, fundamental right. It is a well known fact, at least among Negroes, that Negroes avoid travel by public carrier when they have reason to believe that they will be segregated because of their race. This practice, rather than stimulating the free flow of interstate commerce, is a definite deterrent to travel by these American citizens.

The burden and unreasonableness of segregation is apparent when one realizes the possible results of the enforcement of the carrier's regulation. If any passenger, of any race, insists on being seated and served at a table other than that to which the steward assigns him, upon the steward's determination of his race, the conductor, who has the authority of a peace officer at common law and under statutes of states in which the carrier operates (Code of Alabama, 1940, Title 48, sec. 198; Fla. Stats. Ann. sec. 352.02; Georgia Code Ann. sec. 27-213; North Carolina Gen. Stats., art. 10, sec. 60-82), can eject him from the train and thus totally deprive the passenger of dining car service and carriage. Put more forcibly, the carrier's agent has the authority to say, "You are a Negro (or white)

person and you may not be served at this table where only white (or Negro) passengers may sit and be served. If you insist on remaining here, you will not be served and I will arrest you, remove you from this train, and place you in the custody of the local police authorities." It is likely, however, that the language will be more forceful and vehement.

It is further significant that in several instances when Negro passengers have refused to move at the direction of the carrier's agent from a seat of their selection to another set aside for Negro passengers, in violation of a carrier regulation, they have actually been remitted to the custody of state officers, and charged with the convenient criminal offense of "disorderly conduct", though there is serious doubt whether the offense was committed.[34a]

[34a] In *Taylor* v. *Commonwealth of Virginia*, 187 Va. 214, a Negro passenger was convicted by the trial court of disorderly conduct under the Virginia Code, Section 4533-a which makes it a crime for any person "to be disorderly on a bus . . . by failing to move to another seat when lawfully requested to do so by the operator . . ." The judgment of conviction was reversed on appeal, however, on the ground that his conduct was "morally beyond reproach" and not actually disorderly. In *Lee* v. *Commonwealth of Virginia*, ... So. ....., a Negro passenger was convicted of disorderly conduct for refusal to move to the rear portion of a rail coach reserved for Negro passengers. This case is on appeal to the Supreme Court of Virginia, which, as of this date, has not rendered its opinion. When Negro passengers have been ejected from public carrier or left, under protest, because they refused to move to a seat designated for Negroes, no redress has been available by way of a civil action for damages for false arrest, unlawful ejection, or malicious prosecution. In *Simmons* v. *Atlantic Greyhound Corp.*, 75 F. Supp. 166, a Negro passenger who upon his refusal to move to a rear seat in a bus was asked to leave the bus, and did so, under protest, was denied recovery on the ground that the carrier regulation requiring racial segregation was valid. *Kinchlow* v. *Peoples Transit Co.*, 88 F. (2d) 764 illustrates consequences which may follow from refusal of a Negro passenger to change seats at the driver's direction. There a Virginia statute (Sec. 4097bb of the Va. Code of 1930) gave the motor vehicle operator the right to require a passenger to change his or her seat to maintain racial segregation. Upon the passenger's refusal, the driver summoned the Virginia police who, after the passenger's repeated refusal to change her seat, arrested her, removed her from the bus and charged her with disorderly conduct of which she was convicted. The court found in this case that the passenger actually was guilty of disorderly conduct; that the validity of the statute requiring segregation was not decisive of the issue; and that since the ejection and arrest were made by the policemen under the statute requiring racial segregation there was no showing of unlawful conduct by the driver and no recovery allowable. *Day* v. *Atlantic Greyhound Corp.*, 171 F. (2d) 49, followed the ruling in the Simmons case, denying recovery for ejection from a bus on the ground that the interstate carrier's regulation was valid.

(3) Race of passengers is invalid as the sole basis of classification.

The carrier's regulations refer to "white" and "colored" and the current, amended regulation to "white" and "Negro" passengers. Nowhere does it appear that criteria the carrier, or its agents, utilizes for these classifications. It admits it "had in mind" the regulation "would meet the requirements of all the southern states in which we operate where the segregation laws are effective" (R. 202). In the statutes of these states, North Carolina, South Carolina, Georgia, Florida, Alabama, Louisiana, Tennessee, and Kentucky, definitions of "White", "colored", and "Negro" vary infinitely as was pointed out by the Court in *Morgan* v. *Virginia*, 328 U. S. 373, wherein the Court stated (pp. 382-3):

> Any ascertainable Negro blood identifies a person as colored for purposes of separation in some states. In the other states which require the separation of races on motor carriers, apparently no definition generally applicable or made for the purpose of the statute is given. Court definitions would be required to clarify the line between the races. Obviously there may be changes by legislation in the definition.

This wide variance in definition, in attempt to determine "Who is a Negro?" is understandable inasmuch as anthropologists and others who have given much study to the problem are not in agreement.[34b] If a carrier is permitted to require separation of races some method of identification of who is a Negro and who is white must be employed, as where racial segregation is required by statute. At least the statutes attempted some definitions, but so varying that the confusion arising from their application unduly burdened commerce. In the case of the carrier regulation, herein, there is no definition generally appli-

[34b] Benedict, Ruth, "Race: Science and Politics" (1943); Klineberg, Otto, "Race Differences" (1935); Boaz, Franz, "Race and Democratic Society" (1945).

cable nor has any been made for the purpose of regulation. Certainly it is not within the competency of a public carrier to make such definitions if it should try. In view of the possible consequences which might follow as a result of error or disagreement in a passenger's racial identification it would seem that like a penal statute, the regulation should "be couched in terms that are not so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" so that no "prophetic understanding" is required by those who enforce it and those against whom it is enforced. *Whitney* v. *People of State of California*, 274 U. S. 357.

III. Failure of the Commission to Declare Racial Segregation by Carrier Regulation a Violation of the Interstate Commerce Act and to Forbid Its Enforcement in the Future and Dismissal of the Complaint by the Commission and the Court:

A. Violate the Fifth Amendment.

In reaching its conclusion the Commission relied on testimony irrelevant to the issue of the personal right of the appellant to be accommodated without discrimination or distinction on account of race or color. Over the objections of appellant's counsel (R. 215-6), the carrier was permitted to introduce in evidence the results of two tests showing the number of meals served to white and Negro passengers, respectively. After consideration of this testimony, the Commission concluded:

> The ratio of meals served Negro civilians to the total number served all patrons increased from 1.19 percent during the May 1945 test period to 3.48 percent during the October 1946 period. Should the indicated trend continue, substantial equality of treatment may require the reservation of additional accommodations for Negroes in the future. On the record before us, however, the conclusion is inescapable that the defendant's rules now provide an equitable and reasonable division between the races of its available dining-car space. (R. 9)

This division of accommodations between passengers according to race is clearly intended to provide accommodations for two bodies or groups of persons—white and Negro—according to their numbers, rather than to furnish available accommodations to individual passengers in turn as they present themselves for service. The number of seats provided for each group, even if the entire dining car is reserved exclusively at times for either group, is immaterial if any passenger is refused service solely because of race. If the facilities are available and unoccupied, each individual passenger is entitled to be accommodated at the time service is requested, regardless of the race of other passengers then being served and at any particular table when there is a vacancy.

In *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, this Court said:

> The argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

This principle was reaffirmed in the case of *Mitchell* v. *United States*, 313 U.S. 80. There an interstate carrier denied a Negro passenger available first-class accommodations in a Pullman car, inasmuch as the drawing room, customarily reserved for Negro passengers at reduced rates,

was then occupied. The Commission ruled that the carrier's refusal to accommodate the complainant was not unjust or undue discrimination, under the Interstate Commerce Act, because of the "comparatively little colored traffic." To this, the Court replied:

> We take it that the chief reason for the Commission's action was the "comparatively little colored traffic." But the comparative volume of traffic cannot justify the denial of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. *McCabe* v. *Atchison, Topeka & Santa Fe Rwy. Co., supra.* While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. *It is the individual, we said, who is entitled to the equal protection of the laws, not merely a group of individuals, or a body of persons according to their numbers.* Id. See also *Missouri ex rel Gaines* v. *Canada*, 305 U.S. pages 350, 351; 59 S. Ct. 236, 237; 83 L. Ed. 208. And the Interstate Commerce Act expressly extends its prohibitions to the subjection of "any particular person to unreasonable discriminations." (Italics supplied.)

The testimony as to volume of traffic, apart from its competence and reliability, could not legally have influenced the Commission's decision. Because it was accepted and considered by the Commission as an important factor in reaching its conclusion, the order should be set aside. *Southern Pacific R. Co.* v. *St. Louis Hay and Grain Co.*, 214 U.S. 297; *Florida East Coast R.* v. *U.S.*, 234 U.S. 167; *cf. St. Joseph Stock Yard Co.* v. *U.S.*, 298 U.S. 38.

The Commission ruled that the Interstate Commerce Act neither requires nor prohibits segregation of passengers by

race.[35] Its long-continued practice, however, has been approval of racial segregation, commencing with its decision in 1887, in *Council v. Western & Atlantic R. Co.*, 1 I.C.C. Reports 638. In that case a Negro passenger was directed to move to another car. He refused to do so except under the direction of the conductor, who stood by. He was forcibly ejected and finally removed to another car, as a result of which he was injured. In deciding "whether railroad companies may lawfully separate their white and colored passengers by providing cars for each," the Commission concluded that, under the act, this is a permissible practice. It reasoned as follows:

> It is both the right and duty of railroad companies to make such reasonable regulations as will secure order and promote the comfort of their passengers. In the exercise of this right and the performance of this duty, carriers have established separate cars for ladies, and for gentlemen accompanied by ladies, and the right to make such rules as to sexes is nowhere questioned. A man, white or colored, excluded from the ladies' car by such rule could hardly claim successfully under the Act to Regulate Commerce that he had been subjected to unjust discrimination and unreasonable prejudice or disadvantage because of a custom of the railroad companies in the state where the defendant's railroad is located, and in all the other states where the colored population is considerable to provide separate cars for the exclusive use of colored and of white people.
>
> In Pennsylvania, where, by regulation, separate seats were provided, a colored woman refused to occupy the seat assigned to her; she was put off the car, and the supreme court of the state in that case declared the separation of white and colored passengers in public conveyances to be a subject of sound regulation to secure order, promote comfort, preserve peace, and maintain the rights of both carriers and passengers. In a later case in Illinois the supreme court held that public carriers have no right to discriminate between passengers on account of color until they do furnish separate

[35] Apparently, it is of the view that it has no power to forbid segregation according to statement of its counsel (R. 190).

seats equal in comfort and safety to those furnished to other travelers, the obvious meaning of which is that to furnish separate seats equal in comfort and safety is not unjust discrimination.

These interpretations of the law are in conformity with the decision of Justice Woods, late of the United States Supreme Court, denying to the children of colored parents in Louisiana, under the laws of that state, the right to attend the same public schools as those in which white children are educated. In this case, Justice Woods said: "equality of rights does not necessarily mean identity of rights."

The people of the United States, by their representatives in Congress support the public schools of the country's capital city, and where white and colored children are educated in separate schools. Congress votes public monies to separate charities; men, white and black, pitch their tents at the base of Washington's Monument to compete in acts of war in separate organizations. Trades unions, assemblies and industrial associations, maintain and march in separate organizations of white and colored persons.

Public sentiment, wherever the colored population is large, sanctions and requires this separation of races, and this was recognized by counsel representing both complainant and the defendant at the hearing. We cannot, therefore, say there is any undue prejudice or unjust preference in recognizing and acting upon that general sentiment, provided it is done on fair and equal terms. This separation may be carried out on railroad trains without disadvantage to either race and with increased comfort to both.

Consistently thereafter, the Commission has approved segregation by carriers.[36] It is significant that, in placing this

[36] *Heard* v. *Ga. Rd. Co.*, 1 I.C.C. 428; *Edwards* v. *Nashville, Chattanooga & St. Louis Ry. Co.*, 12 I.C.C. 247; *Cozart* v. *Southern Ry Co.*, 16 I.C.C. 226; *Gaines* v. *Seaboard Airline Ry.*, 16 I.C.C. 471; *Crosby* v. *St. Louis—S. F. Ry. Co.*, 112 I.C.C. 239; *Mitchell* v. *Chicago, R. I. & P. Ry. Co.*, 229 I.C.C. 703; *Stamps* v. *Chicago, R. I. & P. Ry. Co.*, 253 I.C.C. 557; *Brown et al.* v. *A. C. L. Ry. Co.*, 256 I.C.C. 681; *Henderson* v. *Southern Ry.* 258 I.C.C. 413, 269 I.C.C. 73; *LeFlore et al.* v. *Gulf, Mobile & Ohio Ry Co.*, 262 I.C.C. 403; *Barnett* v. *Texas & Pac. Ry. Co.*, 263 I.C.C. 171; *Mays* v. *Southern Ry. Co.*, 268 I.C.C. 352; *Byrd* v. *Seaboard Airline Ry Co.*, 269 I.C.C. 344; *Jackson* v. *Seaboard Airline Ry. Co.*, 269 I.C.C. 399; *Stamps et al.* v. *Louisville & N. R. Co.*, 269 I.C.C. 789.

interpretation upon the Act, the Commission also adopted the view, of some latitude, that "the broad question of the right to segregate white and colored passengers has been upheld by the Supreme Court of the United States. *Hall* v. *DeCuir, L.N.O. & T. Ry. Co.* v. *Mississippi*, 95 U.S. 587; *Plessy* v. *Ferguson*, 163 U.S. 137; *C. & O. Ry.* v. *Kentucky*, 179 U.S. 388." *Edwards* v. *Nashville, Chattanooga and St. Louis Ry. Co.*, 12 I.C.C. 247.

When it was urged before the Commission, in *Brown* v. *Atlantic Coast Line R. Co.*, 256 I.C.C. 681, that segregation *per se* should be declared to be an unlawful discrimination even where equal accommodations can be furnished, the Commission asserted that this contention was evident that "the entire basis of this complaint is the fact that complainants were not permitted to mingle with the white passengers at meals" and that "What complainant asks us to decide is in its essence a social question, and not a question of inequality of treatment such as is prohibited by section 3 of the Act" (p. 695). Extensive portions of the opinion in *Plessy* v. *Ferguson* were then quoted, discussing social equality and declaring that the law is powerless to deal with racial animosity.

In dealing with the question of segregation, the Commission is not faced with a social question. In its essence the issue concerns basic liberties and privileges of individual passengers, not passengers according to their racial identity or number. It involves the right of each passenger to a carrier's facilities on a basis of equality the same as any other passenger, without the arbitrary distinction of race or color.

The Commission relies on *Chiles* v. *Chesapeake & Ohio Ry.*, 218 U.S. 71, and cases cited therein, as authority for its statement that the regulation of a carrier requiring separation of passengers by race is not "unlawful" (R. 190). Apparently this is in answer to appellant's contention that the regulation is unreasonable and a violation of section 1(4) of the Act. In the *Chiles* case the Court stated

that *Plessy* v. *Ferguson* "justified as reasonable the distinction between the races on account of which the statute was passed and enforced" and that the test of reasonableness of a state statute requiring segregation of intrastate passengers must also be the test of the reasonableness of a carrier regulation." Without regard to other infirmities implicit in the rationale of this case, it should be noted it was not decided under the Interstate Commerce Act and we submit that what is reasonable in the exercise of state police power is not necessarily the test of permissible conduct because of the Interstate Commerce Act's language and interpretations given it by this Court. Notwithstanding a violation of section 1(4) has been urged, the Commission has confined its decisions on segregation to section 3(1) of the Act. This question should have been decided by the Commission appropriately under section 1(4) which provides a direct remedy for the correction of a carrier's unreasonable rules, regulations, and practices. *Central Railway Co. of New Jersey* v. *U. S.*, 257 U. S. 247, 257.

That the act does not specifically require nor prohibit racial segregation is no justification for the Commission's refusal to prohibit it. There are obviously numerous practices not required nor prohibited by the act. Yet it is well established that the Commission has power to require or forbid them. In *United States* v. *Pa. Ry. Co.*, 323 U. S. 612, this Court, speaking through Mr. Justice Black, stated (p. 616):

> There is no language in the present Act, which specifically commands that railroads must interchange their cars with connecting water lines. We cannot agree with the contention that the absence of specific language indicates a purpose of Congress not to require such an interchange. True, Congress has specified with precise language some obligations which railroads must assume. But all legislation dealing with this problem since the first Act in 1887, 24 Stat. 379, has contained broad language to indicate the scope of the law. The very complexities of the subject have neces-

sarily caused Congress to case its regulatory provisions in general terms. Congress has, in general, left the contents of these terms to be spelled out in particular cases by administrative and judicial action, and in the light of the congressional purpose to foster an efficient and fair transportation system.

On prior occasions the Court frequently observed the sweeping provisions of the Act. *Warehouse Co. v. U. S.*, 283 U. S. 501, 512-513; *Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740, 749-750; *The Shreveport Case*, 234 U. S. 342, 356. In the latter case, the Court stated (p. 356): "there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach". In answer to the contention that if it be assumed Congress has the power, it had not been exercised, and hence the Commission's action exceeded the limits of the authority conferred upon it, the Court replied: "Such a matter is one with which Congress alone is authorized to deal and in view of the aim of the act and the comprehensive terms of the provisions against discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation." (p. 358) Certainly there is no question that Congress by virtue of its plenary power under Article I of the Constitution, possesses the authority to prohibit segregation. If, then, the absence in the act of specific prohibition is unnecessary to confer authority upon the Commission to correct a discriminatory practice, when that practice is brought to its attention in a proper proceding, it is its duty, and it is given the power under Section 15 of the Act, to enjoin any interstate carrier's regulation or practice which contravenes the act. We conclude, therefore, that the Commission's refusal to do so is beyond the latitude accorded its discretion, and is a denal of due process of law.

That the practice of racial segregation is carrier-initiated is not controlling. It is as a result of the Commission's

ruling that the carrier may continue the practice which the Commission has sustained. Racial discriminations which are the "wrongful acts of individuals" lie beyond the reach of the Constitution only so long as they are "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." *Civil Rights Cases*, 109 U.S. 3, 17. The question in issue here is not simply an "individual invasion of individual rights". *Ibid.*, p. 11. The appellant has asserted a right under the Constitution and Interstate Commerce Act in a matter over which the Interstate Commerce Commission has properly exercised its jurisdiction; the substance and effect of its ruling is that the Commission acting as an agent of the federal government has sanctioned and condoned the practice of racial segregation of passengers. The Court below thus put it (R. 74, 74):

> The complainant is directly asserting in this proceeding that to allow the Commission's order here under review to stand would be tantamount to approving a rule or practice on the part of the Southern Railway that is violative of complainant's constitutional rights and not within the statutory power of the ICC to approve . . .
>
> * * * * *
>
> This contention [that if the carrier lawfully may segregate, the regulation nevertheless permits inequality of treatment] brings us at once face to face with the necessity of passing upon the validity of the dining car regulations of the Southern Railway, in effect at the time in question, because although these regulations have not been promulgated by the Interstate Commerce Commission, they have been directly approved by it, as a result of its decision and order which is the basis for the present complaint. Therefore, they are to be treated, for the purposes of this complaint, as in effect the Commission's rules. This is obviously true for the further reason that the present complainant is contending that the Commission erred in not requiring the Southern Railway to cease and desist from applying these rules; or more specifically, that the Southern Railway should be required hence-

forth to abstain from adopting any rule or regulation with respect to its dining car service that imposes, —as it is claimed the present rules do—upon Negro passengers, restrictions not imposed upon white passengers, under like conditions.

The Commission's order "dismissing a complaint on its merits and maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status". *Rochester Telephone Corp.* v. *U.S.*, 307 U.S. 124, 142. The ruling of the Commission that no violation of the Interstate Commerce Act is shown in the carrier's practice of racial segregation is administrative action which, regardless of form, "bears the clear and unmistakable imprimatur of the federal government. *Shelley* v. *Kraemer*, 334 U. S. 1. Regardless of the form in which the ruling was made—that no violation was shown and no affirmative action was ordered—it is the substance, and not the shadow, which determines the validity of its action. *I.C.C.* v. *Union Pacific R. Co. et al.*, 222 U. S. 541, 5; *Southern Pacific Co.* v. *I.C.C.*, 219 U. S. 433. When the effect of its order is to deny protection to any passenger its action exceeds the bounds of finality and immunity. *Powell* v. *U. S.*, 300 U. S. 276, 285; *Shelley* v. *Kraemer, supra.* A ruling by the Commission that a regulation is not shown to be unreasonable has certainly the same effect as a positive finding of negative fact, such as a ruling that a carrier's rates are not unreasonable, for it is as definite and binding in its effect and results. Cf. *Arizona Wholesale Grocery Co.* v. *Southern Pacific Ry.*, 68 F. (2d) 601. Its findings, positive or negative in form, constitute "a final and indisputable basis of action" as between the Commission and the appellant. Its orders have been said to "constitute a kind of administrative declaratory judgment of the rights of the parties". *Washington Terminal Company* v. *Boswell*, 124 F. (2d) 235.

This Court stated, with reference to the effect of the dismissal of a complaint by the Commission, in *El Dorado Oil Works Co.* v. *U. S. et al*, 328 U. S. 12, at p. 18:

> As the facts already stated reveal, the Commission's finding and determination if upheld constitute far more than an "abstract declaration". "Legal consequences" would follow which would finally fix a "right or obligation" on appellant's part. These findings are more than a mere "stage in an incomplete process of administrative adjudication", for the Commission here has discontinued further proceedings.

Legal consequences have followed from the ruling in this case which illustrate that Negro passengers must continue to be accommodated only at the "Jim Crow" table and, if that table is occupied, they will not be served elsewhere in the dining car although it is practically vacant, and no redress lies before the Commission or through a civil action for damages. In the *Civil Rights Cases*, 109 U. S. 3, at p. 18, this Court stated:

> The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, or his reputation; but *if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.* (Emphasis added.)

The Civil Rights Act of 1866 passed to enforce the provisions of the 14th Amendment was held, in the above cases, to be an unconstitutional legislative act of Congress because the 14th Amendment was not directed at individual action, not sanctioned in some way by the state. Congress, however, has plenary control over interstate commerce and, by the Interstate Commerce Act, has invested the Interstate Commerce Commission with primary jurisdiction to determine the lawfulness of an interstate carrier's regulations and practices. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. The Commission has exercised that jurisdiction in this case and, in effect, has sanctioned the practice of racial segregation enforced under an interstate carrier's regulation. The effect of its decision is to "furnish a precedent in all similar cases"

and its judgment is "conclusive upon the parties until reversed by this Court". *I.C.C.* v. *Brimson*, 154 U. S. 447. Because of the effect of the decision of the Commission and the court below in this case resort to a civil action for damages has been found futile. Even if it be said that the Commission has not "sanctioned in some way" the act of the carrier, that the lawfulness of the regulation has been in issue before the Commission, as a result of which it made its decision and ruling in this case, affirmed by the court below, has been held decisive, unfavorably, on the merits of a civil suit brought for redress against the carrier by a Negro passenger who was refused service at a vacant seat in the diner because the "reserved" table was occupied.[36a]

Unlike an individual who has suffered an individual invasion of a private wrong, an interstate Negro passenger's rights for refusal of accommodations are without vindication by resort to a civil action for redress, whether the wrongful act is denial of accommodations because the "reserved" table is occupied or because the carrier, though providing service, distinguished in the accommodations provided, solely on account of the passenger's race or color.

In *Truax* v. *Corrigan*, 251 U.S. 312, a statute forbidding the issuance of an injunction in a labor dispute, as construed by the state's highest court to grant an immunity to a wrongful individual invasion of another individual's rights, was held by this Court to deprive the person injured of due process of law. The Court stated (pp. 329-330):

> It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of

[36a] *Alleyne* v. *Southern Ry. Co.*, No. 10123, on appeal to U. S. Court of Appeals for the District of Columbia Circuit.

> property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.
>
> . . . To give operation to a statute whereby serious losses are inflicted by such unlawful means are in effect made remediless is we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law.

There the private individuals committed the unlawful acts. They were not acting as agents of the state or under compulsion of the state, nor had they sought the aid of the state to make their action effective, as in the covenant cases. But the law enacted by the state legislature, and as interpreted by the state court, by forbidding the issuance of an injunction against the ex-employees, deprived the employer of his property without due process of law because it made the employees' conduct lawful. It sanctioned an individual's act that harmed another's property and left him without any redress for the loss sustained. In like manner, by failing to forbid the carrier to cease and desist the enforcement of its regulation, the Commission, in permitting the carrier to continue, has sanctioned the carrier's practice of segregating passengers solely according to race or color. If sanction by a state of an individual's unlawful invasion of another's right violates the due process clause of the 14th Amendment, the action of the Commission and the court below are likewise a denial of due process of law, for the scope of the prohibition in the 5th Amendment is measured by the settled scope of the 14th Amendment. *French* v. *Barber Asphalt Paving Co.* 181 U.S. 324. The meaning of the same words in the two amendments is without any distinction that appears in judicial decisions. *Twining* v. *New Jersey*, 211 U.S. 78.

The Commission and the court below are charged with the protection of rights of national citizens, the same as the duty of a state to protect rights arising from state citizenship. *Corfield* v. *Coryell*, 4 Wash. Circuit Ct. Reports 380;

Civil Rights Cases, supra. A state, in discharging that duty, may deprive its citizens of substantive as well as procedural due process, by failure to act. Failure of a state to appoint counsel for a person charged with a serious crime, when necessary to his adequate defense, is a denial of due process of law. *Powell* v. *Alabama*, 316 U.S. 45. Like the state, in *Truax* v. *Corrigan, supra,* the Commission, as the agent of the legislative arm of the federal government, has sanctioned the carrier's conduct. Like the state, it is its responsibility to protect the rights of each individual passenger. Like a state, the Commission should not permit a public carrier to impose upon its passengers any regulation "so as to restrict their fundamental liberties." *Marsh* v. *Alabama*, 326 U.S. 501. It is not only within its power, but it is the duty of the Commission to nullify practices invading personal rights of passengers as well as those resulting in rebates or preferences, "whatever form they take and in whatsoever guise they may appear." *U. S.* v. *La. & P. R. Co.* 234 U.S. 1. In speaking of the affirmative responsibility of the Commission to correct carrier practices invading personal rights of individual passengers, and the exclusion by the carrier of a Negro passenger from a Pullman car as a "palpably unjust" denial of equality of treatment, this Court, in *Mitchell* v. *U. S.*, 313 U.S. 80, at p. 97 stated: "We find no sound reason for the failure [i. e., of the Commission] to apply this principle by holding the discrimination from which the appellant suffered to be unlawful and by forbidding it in the future."

Granting the determination of whether a practice is reasonable or unjust as "one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission",[37] the question here is whether an interstate carrier may lawfully differentiate in the accommodations provided passengers, solely on the basis of a passenger's race or color. This is a matter of law re-

[37] *Manufacturer's Ry. Co.* v. *U. S.* 246 U. S. 457, 481.

viewable by this Court [38] and calls for no expert knowledge or exercise of administrative expertise.

The Commission has simply enforced a substantive rule of statutory interpretation which makes race or color the sole controlling factor in its application. It is as a result of the Commission's decision and order that the carrier may continue to segregate passengers by race. As in *Bridges* v. *California*, 314 U.S. 253, 261, its decision and that of the court below "do not come to us encased in the armor wrought by prior legislative deliberation." Whatever deliberation may lie behind the Commission's terse formulation of policy is not apparent. Its reliance on *Chiles* v. *Chesapeake & Ohio Ry. Co.* is an evasion of its responsibility to determine whether a carrier's regulation enforcing racial segregation is unreasonable under the act. The rancor Negroes must bear when they are discriminated against by owners of public facilities such as restaurants, theaters, hotels, etc. open to all members of the public, except Negroes, becomes intolerable when the federal government lends a hand to discrimination by a public carrier by simply replying to a Negro passenger that no wrong is "shown" in the carrier's enforcement of racial segregation and in failing to assert its power to order it ended. Does the Act have to prohibit segregation in order for the Commission to be shown it is unlawful? Is there any reason why other practices do not have to be spelled out specifically in the act for the Commission to see, upon its own initiative, or be shown, upon complaint made to it, a violation of the act? The conclusion is inescapable that the Commission cannot or refuses to see a violation, properly presented to it for its primary determination.

The Commission's long-continued practice of permitting racial segregation by carrier regulation or practice indicates an intention to adhere in the future to this cryptic formulation of policy. *Cf. Eastern-Central Motor Carrier's Assn.* v. *U. S.*, 321 U.S. 194. The consistency of this

[38] *Central R. Co. of New Jersey et al* v. *U. S. et al*, 257 U. S. 247, 257.

administrative practice, though often challenged, is not reason sufficient to justify its continuance. Acquiescence in the past by the Commission in the transportation of private passenger cars by carriers free of charge or at other than published tariff rates was no justification for its continuance nor a barrier to holding the practice an unjust discrimination in violation of section 3(1) of the Act. *Louisville & N. R. Co.* v. *U. S.* 282 U.S. 740. Notwithstanding the absence in the act of a specific prohibition against the practice, the court therein stated, at p. 759:

> Long continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to facts disclosed. A failure to enforce the law does not change it. The good faith of the carriers in the transactions of the past may be unquestioned, but that does not justify the continuance of the practice.

There are cogent reasons why this administrative practice should be overturned. The manner in which the Commission's powers are utilized in regulating interstate commerce is a matter of public concern. The entire public has an interest in the measure of protection afforded each passenger and an interest in the removal of discriminations and distinctions based on race by agencies of the federal government in matters under their control. Like courts of equity, which "may go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved" the Commission, performing a public act of the federal government in giving and withholding relief requested, should make full use of the powers it possesses to put an end to practices of interstate carriers which make race the sole factor in their application. How the carrier treated appellant and what he and all other Negro passengers may expect in the future is not simply a private, insignificant matter between a Negro passenger and the

Southern Railway Company. "More is involved than the settlement of a private controversy without appreciable consequences to the public."[39] Public carriers which restrict the use of their facilities by Negro passengers to one dining car table behind a partition, in enforced privacy, "are not acting in matters of purely private concern like the directors or agents of business corporations. They are acting in matters of high public interest."[40] The practice of carrier initiated racial segregation is not confined to the Southern Railway, the largest railroad operating in the South, but is enforced by many, if not all, carriers operating in states which have enacted statutes requiring racial segregation of passengers by public carriers, notwithstanding those statutes do not apply to interstate commerce.[41] The growth and extent of this practice beyond state boundaries affecting innumerable passengers, makes it paramountly a matter of public concern. This Court, in *Block* v. *Hirsh*, 256 U.S. 135, stated, at p. 155:

> Plainly circumstances may so change in time, so differ in space as to clothe with such an interest [i. e., a public interest] what at other times or in other places would be a matter of purely private concern . . . They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair.

The public interest in the removal of racial segregation by interstate carrier regulation is certainly at least as great as its interest in the provision of a connection with another road, the purpose of both being to promote public convenience. This court has held that requiring a railroad to furnish this facility, even if it must be done at a loss, is clearly "within the scope of the power to enforce just and

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[39] *Virginia Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 552.

[40] *Nixon* v. *Condon*, 286 U. S. 73, 88.

[41] Regulations of other carriers enforcing racial segregation were before the Commission in *Stamps* v. *L. & N. R. Co.*, 269 I.C.C. 789; *Brown* v. *Atlantic Coast Line Ry. Co.*, 256 I.C.C. 681; and *Jackson* v. *Seaboard Air Line Ry. Co.*, 269 I.C.C. 399.

reasonable regulations" when "considered from the point of view of the requirements of the public interest." *Atlantic Coast Line Ry. Co. v. N. C. Corporation Commission*, 206 U. S. 1.

The sanction given the carrier regulation based solely on race, by the Commission, and its failure to order it terminated is a matter of interest not only to Negro members of the public who bear the brunt of racial segregation. All other members of the public likewise have an interest in its removal, because of the nature of this odious and irrelevant practice, and for the further reason that if this type of arbitrary practice is permitted and sanctioned by the Commission, there is no reason why any other practice as unreasonable and unjust may not be allowed, which will affect them on the same haphazard basis.

(1) *Racial Segregation is Unconstitutional*

The Commission and the Court below were of the opinion that segregation based on race abridges no rights protected by the Constitution or the Interstate Commerce Act. The Commission relied on *Chiles* v. *C. & O. Ry. Co.*, 218 U.S. 71 as authority for the lawfulness of an interstate carrier regulation requiring segregation of passengers by race. The Court below declared that this Court has repeatedly held that "race segregation by State law is not *per se* an abridgment of any constitutional right secured to the citizen. See *Plessy* v. *Ferguson*, 163 U.S. 537; *McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U.S. 151; *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337." (R. 72) It further stated: "Without minimizing the criticism directed at this feature of the service [humiliation and embarassment caused Negro passengers], we point out that the principle of segregation has been approved by the Supreme Court and that the method of carrying it into execution is for the Commission to determine" (R. 79, 256). It concluded: "Racial segregation of interstate passengers is

not forbidden by any provision of the Federal Constitution, the Interstate Commerce Act, or any other Act of Congress so long as there is no real inequality of treatment of those of different races" (R. 260).

An examination of the cases cited in support of the constitutionality or lawfulness of segregation does not support this conclusion, for the cases neither decide the issue herein raised nor are they controlling authority in view of subsequent developments in the law.

The constitutional right of passengers not to be segregated according to race, under state law, was not raised in *Hall* v. *DeCuir*, 95 U. S. 485. The case involved a state criminal prosecution of an interstate carrier for failure to comply with a state law forbidding segregation of passengers by race. The sole question decided was that a state could not forbid racial segregation of passengers because of the burden on interstate commerce caused by the confusion arising from varying provisions of state laws on a subject requiring national regulation. The principle of that case was affirmed in *Morgan* v. *Virginia*, 328 U. S. 373, in which a statute requiring racial segregation of interstate passengers on interstate motor carriers was declared unconstitutional because of the similar burden imposed on interstate commerce. In the latter case the Court recognized the burden imposed on passengers when "required to order their movements on the vehicle in accordance with local rather than national requirements." 328 U. S. at 380-381.

Hall v. *DeCuir* was decided under the commerce clause of the Constitution, in 1877, ten years prior to the enactment of the Interstate Commerce Act. The statement made therein, and relied on in the Chiles Case, that "inaction of Congress was equivalent to a declaration that a carrier could, by regulation, separate colored and white passengers", is today inapplicable, for in the enactment of the Interstate Commerce Act, Congress has restricted the latitude of permissible carrier action and the absence

in the Act of a specific command does not in itself indicate an intention on the part of Congress not to require an act or to forbid a practice. The *Shreveport Case*, 234 U. S. 342; *U. S.* v. *Pennsylvania Ry. Co.*, 323 U. S. 612. Its provisions are broad enough in scope to embrace any prohibition within the power of Congress to declare and its silence is not *per se* equivalent to a declaration that in interstate carrier may enforce racial segregation.

In the most recent case relied on, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, the Court ruled that where a state provides educational facilities, it must furnish them to all its residents and that the provision of equal, though separate, facilities is a method the validity of which has been sustained by this Court's decisions, citing *Plessy* v. *Ferguson, supra; McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co., supra;* and *Gong Lum* v. *Rice*, 275 U. S. 78, in support thereof, and referring to *Cummings* v. *Board of Education*, 175 U. S. 528.[42] In *McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S. 151, the Court stated that, in view of the decision in *Plessy* v. *Ferguson*, it had no reason to doubt the conclusion of the court below that the validity of a state statute requiring separate but equal accommodations for the two races was no longer open to question. In *Chiles* v. *C. & O. Ry. Co.*, 218 U. S. 71, the Court stated:

(1) "We have seen that it was decided in *Hall* v. *Decuir* that the inaction of Congress was equivalent to the

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[42] In *Gong Lum* v. *Rice*, *supra*, the Court held that equal protection of the laws was not denied a Chinese child by classifying her as "colored" and in compelling her to attend a school maintained for colored races. The Court quoted from *Plessy* v. *Ferguson*, noting its reference to *Roberts* v. *City of Boston*, 5 Cush. (Mass.) 198 (decided prior to the 14th Amendment), as authority for the constitutionality of state classification by race or color and concluded that, "assuming the cases above cited to be rightly decided" (uphold: g the constitutionality of separate schools for white and black pupils), a distinction between white and yellow pupils was permissible. There the constitutionality of segregation was not decided but assumed to be valid by authority of *Plessy* v. *Ferguson*. In *Cummings* v. *Board of Education*, 175 U. S. 528, the Court, speaking through Mr. J. Harlan, held that an injunction to restrain the collection of local taxes because separate high school facilities had been abandoned was not proper; but that a different question would have arisen if the plaintiffs had sought directly in an appropriate proceeding to compel the board of education to establish and maintain a separate school for Negro children.

declaration that a carrier could, by regulations, separate colored and white interstate passengers.

(2) "*Plessy* v. *Ferguson* justified as reasonable the distinction between the races on account of which the statute was passed and enforced. It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs, and traditions of the people,' and the 'preservation of the public comfort and the preservation of the public peace and good order,' this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. Regulation which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable. See also *Chesapeake & O. Ry. Co.* v. *Kentucky*, 179 U. S. 388.

"The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it. We may refer to Mr. Justice Clifford's concurring opinion in *Hall v. DeCuir* for a review of the cases. They are also cited in *Plessy* v. *Ferguson* at page 550."

Chesapeake & Ohio Ry. Co. v. *Kentucky*, 179 U. S. 388, cited in the opinion above, decided that a state statute requiring separate railroad coaches for white and colored passengers was not invalid as an interference with interstate commerce because, as construed by the highest court of Kentucky, it applied only to intrastate passengers. So construed, the court stated there was no doubt as to its constitutionality, citing *Plessy* v. *Ferguson*.

Reference to the cases relied on shows *Plessy* v. *Ferguson* as the source and main support for the establishment and maintenance of racial segregation as an institution in American democratic society and the uncritical dependence on this case as having foreclosed once and forever the validity of state action based on distinctions between citi-

zens solely because of their race. Segregation is constitutional, the courts consistently rule, irrespective of the applicable rulings of this court which make its authority questionable and irrespective of the particular right asserted and not decided in that case.[43]

Plessy v. *Ferguson*, 163 U. S. 537, held that a state law requiring segregation of intrastate passengers by race was not an abridgment of a colored citizen's privileges or immunities, nor a deprival of property (the reputation of belonging to the dominant race) without due process of law, nor a denial of equal protection of the laws. The Court's conclusion proceeded from three basic premises: (1) the 14th Amendment was not intended to abolish racial segregation; (2) segregation "does not necessarily imply the inferiority of either race to the other" and if it does "it is solely because the colored race chooses to put that construction upon it"; and (3) racial distinctions afford a reasonable basis for the exercise of state police power.

The legislative history of the 14th Amendment, including the debates preceding the adoption of the Civil Rights Act of 1866 whose analogous provisions were considered to be incorporated in the 14th Amendment,[44] affords substantial justification for the view that the 14th Amendment was intended to abolish racial segregation and it was so understood by the majority of its supporters, its opponents, the state legislatures ratifying it, and the public.[44a]

Whether segregation necessarily implies inferiority may have been a matter of conjecture in 1896, when *Plessy* v. *Ferguson* was decided. The Court believed not, but subsequent experience with segregation in actual practice over a period of years has unequivocally proved the fallacy of

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[43] One variance is noted in *Mendez* v. *Westminster School Dist.*, 64 F. Supp. 544, aff. 161 F. 2d 774, noted in 56 Yale Law Journal 1059, in which the lower court held that the provisions of separate schools for children of Mexican ancestry admittedly equal to other schools did not afford equal protection of the laws under the 14th Amendment.

[44] Flack, *The Adoption of the 14th Amendment*, pp. 54, 81.

[44a] Ibid., pp. 41, 45, 54, 173-5, 250-277; 2 Congressional Record 4174-4 (1874).

this assumption and overwhelmingly demonstrated in the most graphic manner that segregation not only implies inferiority—it does mark Negroes as inferior and unfit to associate with or share public facilities on a common basis of indiscriminate equality with persons of other races. And it is, as a matter of provable fact, not because of the construction put upon it by the "colored race" but because of the infirmities imposed upon members of a minority group, who are certainly kept separate, but who have never shared equality, not even that mythical "substantial" equality. Mr. Justice Harlan in his dissenting opinion in *Plessy* v. *Ferguson*, pointedly stated (163 U. S. at 562):

> We boast of the freedom enjoyed by our people above all other peoples. But is is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of citizens, our equals before the law. The thin guise of "equal" accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done.

The Report of the President's Committee on Civil Rights, entitled "To Secure These Rights", issued on October 29, 1947, puts the matter squarely, pp. 81-82:

> If evidence beyond that of dispassionate reason was needed to justify Justice Harlan's statement [quoted above], history has provided it. Segregation has become the cornerstone of the elaborate structure of discrimination against some American citizens. Theoretically this system simply duplicates the educational, recreational, and other public facilities for the two races which are "separate but equal". In the Committee's opinion this is one of the outstanding myths of American history, for it is almost always true that while indeed separate, those facilities are far from equal. Throughout the segregated public institutions, Negroes have been denied an equal share of tax supported services and facilities.

That segregation more than implies and implements an inferior status has been established by extensive, well-documented, competent research, which is relevant and whose consideration is necessary to an informed judgment.[45] An examination and appraisal of the *facts* will clearly demonstrate that segregation does in fact imply inferiority and is unconstitutional by the very test implicit in the opinion in *Plessy* v. *Ferguson*, for it appears that if the Court was of the opinion that the statute requiring segregation did imply inferiority, it would have invalidated it.[45a]

Plessy v. Ferguson, further, as the Court paraphrased its opinion in *Chiles* v. *C. & O. Ry. Co.*, 218 U. S. 71, "justified as reasonable the distinction between the races on account of which the statute was passed and enforced", that purpose being for "the promotion of their comfort and the preservation of the public peace and good order". While the preservation of peace and good order is a permissible objective in the exercise of police power, if that is the real purpose of segregation, decisions of this Court amply show that classification by race alone has no reasonable relation to this end nor is it a means reasonably adapted to achieve it. To the argument that residential segregation would prevent race conflicts and promote the public peace, this Court, in *Buchanan* v. *Warley*, 245 U. S. 60, 80-81, replied: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution". In a later case, *Harmon* v. *Tyler*, 273 U. S. 668, in which the lower court had ruled

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[45] See, for example, Gunnar Myrdal, "An American Dilemma, The Negro Problem and Modern Democracy", pp. 27-30, 757-764; Buel G. Gallagher, "Color and Conscience—The Irrepressible Conflict"; Johnson, "Patterns of Negro Segregation", pp. 244-324; Heinrich, "The Psychology of a Suppressed People", pp. 52, 57-61; Dollard, "Caste and Class in a Southern Town", p. 253; Sutherland, "Color, Class and Personality", pp. 42-59; Moton, "What the Negro Thinks", pp. 12-13.

[45a] This conclusion is also suggested in "Is Racial Segregation Consistent With Equal Protection of the Laws: Plessy v. Ferguson Reexamined", 49 Col. L. Rev. 629 (1949); and "Segregation in Public Schools—A Violation of Equal Protection of the Laws' "; 56 Yale L. J. 1059 (1947).

that an ordinance similar to the one involved in *Buchanan* v. *Warley, supra,* was a legitimate exercise of the police power to discourage social intercourse between the races and was not discriminatory because the restraint applied equally to both races, the judgment enjoining the leasing of a home in a white community to a Negro was reversed *per curiam* on the authority of the *Buchanan* case.

In determining the reasonableness of an interstate carrier's regulation, the court, in *Chiles* v. *C. & O. Ry. Co.*, 218 U. S. 71, also followed the test used in *Plessy* v. *Ferguson*—"the established usages, customs, and traditions of the people", as well as the promotion of public comfort, peace and good order. Where members of a minority are asserting that a law infringes their rights, it is particularly inappropriate to look to established usages, customs, and traditions to determine whether a law deprives them of rights. Obviously, under this test, any law the majority enacts would be reasonable though that very law may nevertheless deprive minorities of their rights, because the denial has been one of custom, usage, and tradition, wilfully or unintentionally, and the minority, because it is a minority, has lacked recognition and protection of its rights. This seems to have been recognized by this Court in its attitude when the reasonableness of legislation has been challenged. The usual presumption supporting the validity of legislation does not prevail where prejudice against "discrete and insular minorities" may tend "seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States* v. *Carolene Products Co.*, 304 U. S. 144, f.n. 4.

The history of the struggle of the Negro minority to exercise the right to vote is a striking example of the error in recourse to customs and traditions to determine the validity of legislative or other State action. Even after the specific right was granted by the 15th Amendment to the Constitution, and this Court declared the right of

Negroes to vote, the custom of denying the exercise of the right continued and one lawsuit after another has been required to overcome devices used to deny this right, in accordance with the established custom, usage, and tradition of the majority.[46]

The test of reasonableness utilized in *Plessy* v. *Ferguson* is not the test customarily employed to determine the "reasonableness" of legislation. Prior thereto, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, the standard was found in essential justice. The rule usually applied by this Court in determining whether federal or state governmental action is due process of law is whether it bears a reasonable relation to a permissible end. *Nebbia* v. *New York*, 291 U. S. 502; *Heiner* v. *Donnan*, 285 U. S. 312. It is clear that distinctions because of race or ancestry are odious in our democratic society and except in the most unusual circumstances bear no relation to a permissible governmental end. During the past war, the race or national origin of Japanese citizens, otherwise irrelevant, was a fact of which the federal government could take cognizance and make the basis of classification because it was of important relevance to a governmental end, the prosecution of war with Japan. In *Hirabayashi* v. *U. S.*, 320 U. S. 81, this Court stated:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. [Citations omitted.] We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with perils

[46] *Nixon* v. *Herndon*, 273 U. S. 536; *Guinn* v. *U. S.*, 283 U. S. 347; *Meyers* v. *Anderson*, 283 U. S. 368; *Lane* v. *Wilson*, 307 U. S. 268; *Nixon* v. *Condon*, 286 U. S. 73; *U. S.* v. *Classic*, 313 U. S. 299; *Smith* v. *Allwright*, 321 U. S. 649; *Rice* v. *Elmore*, 165 F. 2nd 387; cert. denied, 333 U. S. 875; *Brown* v. *Baskins*, 78 F. Supp. 933.

> of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others.

Thus, "pressing public necessity", as in time of war, may justify the complete segregation of a single racial group, though in time of peace such action would be "lawless". *Korematsu* v. *U. S.*, 323 U. S. 214, 216, 224.

To determine whether equal protection has been afforded, the distinction or classification made must have a rational basis in a genuine difference between the groups affected, reasonably related to the subject matter. Differences of race or color or national origin are an irrelevant and arbitrary classification. Where, as a result of such classification, persons are discriminated against, by intention or result, solely because of race or color, the action has been declared unconstitutional. This rule has been followed where Negroes have been the particular persons discriminated against.[46a] Race clearly cannot be made the basis of classification affecting the right to vote. *Nixon* v. *Herndon*, 273 U. S. 536. Negroes are, of course, not the only minority discriminated against. State action has been invalidated also when the discrimination is directed at citizens or aliens of other national origin, members of another "colored race".[47] A state may not make race or color a basis of classification simply because Congress may and has done so, in the exercise of power conferred upon it by the Constitution. *Takahashi* v. *Fish and Game Commission*, 332 U. S. 410. The power of the state, like the power of an interstate carrier, is more narrowly limited than that of Congress. And the fact that the state's action, whatever its nature, may apply indiscriminately to all racial

[46a] *Hill* v. *Texas*, 316 U. S. 400; *Strauder* v. *W. Va.*, 100 U. S. 303; *Virginia* v. *Rives*, 100 U. S. 313; *Ex Parte Virginia*, 100 U. S. 339, involving exclusion of Negroes from service on petit and grand juries.

[47] *Oyama* v. *California*, 332 U. S. 633; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

classes defined makes it nonetheless a denial of equal protection of the laws. *Buchanan* v. *Warley*, 245 U. S. 60; *Shelley* v. *Kraemer*, 334 U. S. 1.

Whether the Court in *Plessy* v. *Ferguson* considered racial segregation permissible and reasonable under the due process or the equal protection clause of the 14th Amendment, the error of its ruling is plain when considered in the light of subsequent decisions from which it marks a serious departure and with which it cannot be reconciled.

Plessy v. *Ferguson* has been wholly relied on, as in the *Chiles* case, as authority for the broad statement that the Supreme Court has upheld the constitutionality of segregation or, as the court below stated, "the principle of segregation has been approved by the Supreme Court" (R. 256), and that the question of the constitutionality of racial segregation is closed.

The results of its ruling have borne out Justice Harlan's prediction, in his dissenting opinion, that "the judgment this day rendered will in time, prove to be quite as pernicious as the decision in the *Dred Scott* case." *Plessy* v. *Ferguson* has received much attention and has been the subject of much criticism because of its untenable uninformed assumptions and its fallacious reasoning.[47a] Millions of Americans who, directly as a result of its formulation of the doctrine of "substantial equality" or "separate but equal", have experienced the enforcement only of separateness, and are still, and will continue to be, denied equality. The Report of the President's Committee on Civil Rights makes this indictment:

> The separate but equal doctrine stands convicted on three grounds. It contravenes the equalitarian spirit of the American heritage. It has failed to operate, for history shows that inequality of service has been

[47a] See note 45a, *supra*; Waite, "The Negro in the Supreme Court," 30 Minn. L. Rev. 319 (1946); Watt and Orlikoff, "The Coming Vindication of Mr. Justice Harlan," 44 Ill. L. Rev. 13 (1949); McWilliams, "Race Discrimination and the Law," Science and Society, Vol. 9, No. 1 (1945).

> the omnipresent consequence of separation. It has institutionalized segregation and kept groups apart despite indisputable evidence that normal contacts among these groups tend to promote social harmony. [P. 87.]

The opposition of segregation to basic concepts of democracy and its effect on all those who enforce the segregation as well as those who are segregated,[48] should not be overlooked. The Report also stated (p. 141):

> It is impossible to decide who suffers the greatest moral damage from our civil rights transgressions, because all of us are hurt. That is certainly true of those who are victimized. Their belief in the basic truth of the American promise is undermined. But they do have the realization, galling as it sometimes is, of being morally in the right. The damage to those who are responsible for these violations of our moral standards may well be greater. They, too, have been reared to honor the command of "free and equal." And all of us must share in the shame at the growth of hypocrasies like the "automatic" marble champion. All of us must endure the cynicism about democratic values which our failures breed. *The United States can no longer countenance these burdens on its common conscience, these inroads on its moral fiber.*

It has been said "The mere formulation of a relevant constitutional principle is the beginning of the solution of a problem, not its answer".[49] Assuming the establishment of segregation as a conscientious attempt to deal with the problem of race hostility, and the formulation of the principle of "separate but equal" as an effort to provide constitutional protection within that restriction, experience

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[48] In a study made for the purpose of securing data which would be of assistance to courts in considering the validity of racial segregation, it was reported that in a poll taken of current opinion of psychologists, sociologists, and anthropologists, 90% of the total sampled were of the opinion that enforced racial separation has detrimental effects on the segregated groups and 83% that it also has detrimental effects on the group which enforces the segregation. Deutscher and Chein, "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion." (1947)

[49] Mr. Justice Frankfurter, dissenting in *People of State of Illinois* v. *Board of Education*, 333 U. S. 203, at p. 212.

has shown that "separate but equal" is only a theory, and is not the answer to the problem. Because of the conflict of *Plessy* v. *Ferguson* with present day law, its authority has been greatly impaired and it is no longer binding. To the extent that it is applicable to the validity of an interstate carrier's regulation, under the Interstate Commerce Act, *Plessy* v. *Ferguson* and *Chiles* v. *Chesapeake Ry. Co.*, 218 U. S. 71, which is based on *Plessy* v. *Ferguson*, are eminently and of necessity now subject to re-examination and should be overruled.

B. The action of the Commission and the Court is contrary to the national transportation policy of the United States.

The national transportation policy of the United States should be clarified by this Court, with respect to the race of interstate passengers. This requires reconsideration of *Chiles* v. *Chesapeake and Ohio Ry. Co.*, 218 U. S. 71, and *Plessy* v. *Ferguson*, 163 U. S. 537, which it follows, and the unequivocal declaration of a single uniform rule for seating arrangements for interstate passengers, under the commerce clause of the Constitution and the Interstate Commerce Act, stripped of technicalities and the irrelevances of race.

Thus far this Court has declared the law to be: (1) States may require racial segregation of intrastate passengers if equal facilities are provided. *Plessy* v. *Ferguson*, 163 U. S. 537. (2) States may not forbid or require racial segregation of interstate passengers, *Hall* v. *DeCuir*, 95 U. S. 485; *Morgan* v. *Virginia*, 328 U. S. 373. (3) An interstate carrier may, in the absence of action by Congress, by regulation, segregate passengers according to race. *Chiles* v. *Chesapeake and Ohio Ry. Co.*, 218 U. S. 71. (4) Refusal of accommodations solely because of a passenger's race is discriminatory and a denial of the fundamental right of equality of treatment specifically safeguarded by the Interstate Commerce Act. *Mitchell* v. *U. S.*, 313 U. S. 80.

Three questions arise: (1) In the field of interstate commerce, within the exclusive purview of the federal government, may an interstate carrier, in a matter where a single, uniform rule for seating arrangements is required, segregate passengers solely according to race or color? (2) Is indiscriminate equality of treatment afforded when passengers are segregated solely because of race or color? (3) Is racial segregation a burden on interstate passengers and carriers, unreasonable, and unnecessary?

We contend the answer to the first question is that under the sweeping provisions of the Interstate Commerce Act, designed primarily for the protection of passengers, a carrier may not segregate passengers solely because of race and that this Court should so declare unequivocally. The discriminatory carrier practice based solely on race is within the power of Congress to forbid and within the authority of the Commission to order the carrier to cease. In the enactment of the Interstate Commerce Act, as an expression of the national transportation policy, there is no warrant that Congress intended interstate passengers be segregated according to race, notwithstanding the absence in the Act of a specific prohibition.

The answer to the second question is that differentiation between passengers, according to their race and numbers, is not equality of treatment even though the restriction imposed by the carrier, on freedom of selection of accommodations and of passengers with whom one chooses to dine; apply with equal force to all passengers indiscriminately, but solely according to race. The right to equality of treatment, like the right to equal protection of the laws, is a right personal to each individual passenger. In view of their identity in nature and of our constitutional policy, equality of treatment, like equal protection of the laws, is denied when race is made the sole basis of the carrier's action restricting any passenger's right to eat where and with whom he chooses. Equality of treatment is thus denied the same as equal protection, by "indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U.S.

1, 22. Certainly Congress intended it to be a policy of national transportation that a carrier be held to at least the standard of equal treatment as that of a state under the equal protection clause and, in view of the language of the act and its interpretation by this Court, the measure of duty required of a state under the equal protection clause is at least the minimum measure of equality of treatment required of a carrier under the act. Certainly Congress did not intend to authorize indiscriminate inequality of treatment.

The answer to the third question, we submit, is that racial segregation enforced by voluntary carrier regulation is as much a burden on interstate passengers as is a state statute compelling a passenger to order his movements in accordance with local customs. Though no shifting of seats is required under the carrier's regulation, a Negro passenger has no choice of accommodations in sections set aside for *all other* passengers. Yet no state can deprive him or any other person of choice as to a place to live, solely because of race, by legislation or judicial enforcement of covenants expressing individuals' notions of where he or another may live. Negro passengers are the only passengers confined to the use of one table. This discrimination against persons of one race or color is just as discriminatory as that imposed on citizens of another race or color when, solely because of that race or color, he is deprived of property. *Oyama* v. *California*, 332 U. S. 633. Certainly rights of person are entitled to at least the same respect and protection as rights in property. The humiliation and indignity suffered by Negroes when they are ostracized from everyone else is a burden that can really be appreciated only by those who have ever been punished for crimes they have not committed. The carrier has imposed upon itself the burden of cost in removing the separating curtains and installing partitions in every dining car, though this burden will ultimately fall on all passengers. In the absence of a supporting definitive statute, it has assumed the burden of determining the race of pas-

sengers in assigning them space, and the cost resulting from its liability for error in the determination, though this also is ultimately borne by the passengers.[50]

Apart from the personal burden on Negro passengers, racial segregation of interstate passengers by carrier regulation is directly opposed to what this Court has declared the national transportation policy requires—a uniform rule in seating arrangements, without distinction as to the race of passengers. In *Morgan* v. *Virginia*, 328 U. S. 373, a Virginia statute requiring racial segregation of interstate passengers was declared unconstitutional under the commerce clause. Under this ruling it would follow that the Virginia statute, and the statutes of any other state in which the Southern Railway operates, requiring racial segregation of passengers on interstate rail carriers are invalid. That the ruling is not confined to interstate motor carriers is apparent in the Court's affirmance of the principle established in *Hall* v. *DeCuir*, 95 U. S. 485, which involved an interstate water carrier. The mode of conveyance is immaterial, for the principle is that a state may not forbid or require racial segregation of interstate passengers.[51] In so far, therefore, as the Virginia statute[52]

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[50] Damages have been recovered for this mistake. *May* v. *Shreveport Traction Co.*, 127 La. 420, 53 So. 671; *Flood* v. *News and Courier Co.*, 71 S. C. 112; *City Bus Co.* v. *Thomas*, 172 Miss. 424, 160 So. 582; *Louisville Ry. Co.* v. *Ritchel*, 148 Ky. 701, 147 S. W. 411, 41 L. R. A., N. S. 958, Ann. Cases.

[51] Chairman Aitchison, in his dissenting-in-part opinion said: "For the reasons stated in my dissenting-in-part expression in *Mays* v. *Southern Railway Co.*, 268 I. C. C. 322, decided April 8, 1947, wherein we considered the identical dining car regulations that we are now considering, I dissent from the finding that these regulations, now currently in force, are not shown to be in violation of section 3, or of any other provision of the act." (R. 11) In the Mays case, he stated: "However, I am constrained to regard it as now settled by *Morgan* v. *Virginia*, 328 U. S. 373, and *Matthews* v. *Southern Railway System*, 157 F. 2nd 609, that the race of a passenger may not constitute a valid basis for any differentiation or segregation in the course of interstate travel upon a carrier subject to the provisions of the Interstate Commerce Act, as that act now stands, and as interpreted by the courts." In *Matthews* v. *Southern Railway System*, *supra*, the court said that the passengers were correct in their contention that the Virginia statute requiring racial segregation on railways was invalid as to interstate passengers and stated: "That question has been settled by *Morgan* v. *Virginia*, 1946, 66 S. Ct. 1050. The decision in the case at bar was withheld by this court pending that decision, as probable jurisdiction was noted, 66 S. Ct. 491, in that case, shortly after this case was argued. We see no valid distinction between segregation in buses and in railroad cars."

[52] Va. Code Ann. 1942, Secs. 3962-3964.

requiring racial segregation applies to interstate rail passengers, it is unconstitutional under the commerce clause.

If seating arrangements of interstate carriers is a matter "where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose[53]—it logically follows that racial segregation by interstate rail carriers is likewise unnecessary and, like "state regulation of association on interstate vehicles", the carrier regulation "hampers freedom of choice in selecting accommodations".[54] The alleged usefulness of racial segregation is that it preserves the public peace, but this is far outweighed by its disadvantages: discrimination against particular persons—Negro passengers; discrimination against any diner denied available accommodations solely because of his race; waste of accommodations and loss of revenue to carriers, by refusing service to passengers because the space is reserved for those of another race or color; increased cost to the carrier, ultimately borne by all passengers, of installing partitions in all dining cars; the difficulty and burden imposed on the steward in determining pasengers' racial identity; the cost to the carrier for error in deciding a passenger's race and assigning him to a section reserved for passengers of another race; and the approved practice of classifying passengers on the irrelevant and arbitrary basis of race.

The Court in *Morgan* v. *Virginia, supra,* emphasized the necessity for a "single uniform rule, to promote and protect national travel". 328 U. S. at 386. It is common knowledge that no segregation by race of passengers is the rule in the majority of national travel, rail, water, and air. It appears then, that the rule of a minority of carriers, including the carrier herein involved, is in direct opposition to, and impedes this requirement.

The carrier can no longer be considered as a mere pricate individual or corporation making rules for the use of its property. That property has become sufficiently im-

[53] 328 U. S. at 377.
[54] Ibid at 383.

pressed with a public interest to be circumscribed by the same limitations applicable to states and if state imposed racial segregation is invalid irrespective of the particular constitutional provision invoked, because a uniform rule in seating arrangements without regard to race is necessary to promote and protect national travel, it is difficult to see how carrier imposed segregation squares with the requirement.

Assuming that Congress has the power, within the limitations of the Fifth Amendment, to require segregation of passengers according to race, it has not acted, even under its power to prescribe rules applicable to particular localities. In the absence of action by Congress, states undertook to regulate the subject, but this Court ruled that this could not be done. Since Congress has not acted, and the states are forbidden to regulate the subject, eminently one for national regulation, it hardly seems appropriate to allow a privately owned corporation, exercising a public function, to dictate seating arrangements of interstate passengers according to their race.

This Court has never ruled that racial segregation of passengers is permitted under the Interstate Commerce Act. In *Mitchell* v. *U. S.*, 313 U. S. 80, the Court stated that the question there involved was not one of segregation. The contention was strenuously urged that state statutes requiring racial segregation of passengers on railroads were not applicable to an interstate passenger. The appellant did not contend, nor did the Court decide, the question whether racial segregation, in and of itself, is a violation of the act. There a Negro passenger was absolutely refused Pullman accommodations although space was available, other than in the drawing room to which Negroes are customarily assigned, at reduced rates. In such a situation the Court declared that the carrier's total denial was discriminatory and a denial of equality of treatment, and that the passenger was entitled to be accommodated on the same basis as any other passenger. In view

of the total refusal of accommodations there was no occasion to decide, if facilities had been furnished, but on a segregated basis, whether racial segregation per se is a violation of the act. That the drawing room was occupied and that the carrier would have had to accommodate the passenger on a non-segregated basis was immaterial. The Court made it clear that he was entitled to available accommodations on that trip. If the drawing room was occupied, whether or not the carrier had any other means of segregating him, he was entitled to space on that trip and to be seated elsewhere in the car where there was space, partitions, doors, or curtains absent notwithstanding.

This Court has recognized the "need for national uniformity in the regulations for interstate travel". *Morgan* v. *Virginia*, 328 U. S. 373, 386. If it is clear that a single uniform rule as to seating arrangements is necessary to promote and protect national travel by interstate motor carriers, it is certainly clear that a single, uniform rule is necessary to promote and protect national travel by interstate rail carriers, at least that of Negro passengers whose numbers have increased. That need of national uniformity is not met when regulations, imposed by some carriers, are directly opposed to the rule. This Court has held that, under the commerce clause, the national interest in uniformity is paramount. To protect and promote the national interest in travel by Negro interstate passengers as to race, the regulation of a carrier, attempting to deal with race relations beyond the power of the states in which it operates, should be declared by this Court an unlawful regulation of interstate commerce in a matter where only Congress is authorized and competent to act.

C. The action of the Commission and Court is contrary to the public policy of the United States.

Historically courts have quarried public policy from domestic laws and legal precedents,[55] international compacts and from the declarations and judgments of its great jurists and statesmen. It may be that the utterances of great jurists and statesmen like Holmes, Washington, Lincoln, Jefferson, Stone, Brandeis, Cardozo and Murphy who have undoubtedly helped to formulate public policy ought to have the same persuasive influence in judicial interpretation accorded legislative history.

The bedrock of American policy and legal thought as expressed by its chief spokesmen and written in our basic legal charters is that all men are created equal, that the sanction of law is denied to racial discrimination. Equality is based on the universal principles of justice and on the natural, immutable, moral law and the unchanging law of God. If the United States is to continue as the chief democratic power in the world, its highest court must clearly, courageously and without dogma or legalism reaffirm these basic truths in practical, not technical or theoretical terms. "The fundamental principles of our legal system are not technical concepts. They are as universal as the Christian philosophy that conceived them. They are understood by school children who may not be able to explain them. They have been the basis for social and economic crusades by the rank and file who, without comprehending their origins or their technical aspects, only know that they call for the fundamentals of fair play and decency. They have been rallying points for aroused communities who need no lawyer's brief or citation of precedents to clinch their contention that the American way of life in some specific particular has been violated."[56]

The preamble of the United Nations Charter reaffirms the faith in fundamental human rights, in the dignity and

[55] *Muscahany v. United States*, 324 U. S. 49, 66.

[56] William O. Douglas, "On Being An American," p. 44.

worth of the human person, in the equal rights of men and women, everywhere, and of nations large and small.

The Charter is a treaty ratified by the Senate and like all treaties so ratified is the supreme law of the land. (Art. VI, U. S. Constitution.) It provides that all signatories thereto shall promote universal respect for and observance of human rights and fundamental freedoms regardless of race and that member nations shall take joint and separate action for that purpose, Art. 55(c) and 56 (59 stat. 1031-1045-1046). This "supreme law of the land" and pledge of our government prevents it from in any wise aiding, sanctioning, or condoning the kind of racial segregation involved in the case at bar. On the contrary it compels the Federal government and all Federal agencies to respect, observe, and promote human rights without racial distinction.

The Commission and court below in validating the Commission's finding have condoned the respondent's discriminatory regulation thereby violating the Federal government's obligation under the charter and preventing its own citizens from practising tolerance and living together in peace as neighbors as proclaimed by the Charter. The achievement of the objectives of the Charter have been construed by the courts. *Nielson* v. *Johnson*, 279 U. S. 47, *Hurd* v. *Hodge*, 162 F. (2d) 233 (Justice Edgerton's dissent).

In Canada in November 1945 in the case of *In Re Drummond Wren*[57] which held restrictive covenants void as against public policy, the Supreme Court of Ontario rested its decision upon the United Nations Charter. Justice McKay speaking for the Court said that it is a well recognized rule that courts may look upon public law as an aid in determining public policy. Said he: "First and of profound significance is the recent San Francisco Charter, to which Canada was a signatory, and which the Dominion Parliament has now ratified." This decision

[57] 4 D. L. R. 674.

compels attention as a landmark in international law and as meeting the test of Mr. Henry Stimson: "The moral judgments case by case of the civilized nations of the world."

We have ratified the United Nations Charter and surely this is a landmark of persuasive precedent in international law which the United States as moral leader of the world should follow. We have the choice of witnessing the demise of racial segregation or the inquest of democracy.

"Today American citizenship is one of the few remaining symbols of human hope throughout the world. It is a prized possession. It is a sacred covenant passed on by the Founders of this Republic. The Founders never referred to or had in mind anything but one type of citizenship for all. There must not grow up in this country any second or third class citizenship. There is only one class of citizenship in this nation; there is no room for any inferior grade. Where one has been allowed, the result has been the downward spiral of disunity. Then hate and intolerance have been incorporated. Under those conditions the enemies of democracy invariably have risen to power." [58]

"The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship, which sent the centurion scurrying to his higher-ups with the message, 'Take heed what thou doest, for this man is a Roman' ". [58a] Negroes are American citizens; this Court should take heed what it does to them. They are entitled under law to more than improved, separate inequality. They are entitled to complete equality.

The official and traditional public policy of the United States against discrimination based on race is embodied in all of our basic charters of government and treaties, [59]

[58] Douglas, "On Being An American," p. 42.

[58a] Mr. Justice Jackson, concurring in *Edwards v. California*, 314 U. S. 160.

[59] The Declaration of Independence; The Constitution of the United States, Amendments 5, 13, 14 (Section 1), 15 (Section 1); Potsdam Agreement.

statutes,[60] court decisions,[61] international compacts,[62] presidential proclamations,[63] as well as in the Charter of the United Nations. The regulation involved is so clearly contrary to this policy that the judgment of the court below should be reversed.

In the face of this public purpose and policy of our government as set forth, announced to, and relied upon, by the peoples of the world and believed in by the majority of our citizens, we cannot ignore the feeling of cold guilt and the world's accusing glance. The compelling sum-

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[60] Rev. Stat. 1977 (8 U. S. C. 41); Rev. Stat. 1978 (8 U. S. C. 42); Rev. Stat. 1979 (8 U. S. C. 43); Rev. Stat. 2004 (8 U. S. C. 31); 14 Stat. 27; 17 Stat. 13; 43 Stat. 936 (28 U. S. C. 225); 49 Stat. 1027 (28 U. S. C. 400); 59 Stat. 1045; 59 Stat. 1046; 59 Stat. 1213; Rev. Stat. 5510.

[61] *Steele* v. *Louisville & Nashville Ry. Co.*, 323 U. S. 192: "discriminations based on race alone are obviously irrelevant and invidious." Mr. Justice Murphy concurring (at p. 208): "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it whenever it appears in the course of a statutory interpretation." *Korematsu* v. *United States*, 323 U. S. 214, 216: " . . . to begin with . . . all legal restrictions which curtail the civil rights of single racial group are immediately suspect. . . . Pressing public necessity may sometimes justify the existence of such restriction; racial antagonism never can." *Hirabayashi* v. *United States*, 320 U. S. 81, 100: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Smith* v. *Texas*, 311 U. S. 128, 130; "For racial discrimination . . . in . . . jury service . . . is at war with our basic concepts of a democratic society and a representative government." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374; ". . . hostility to the race . . . to which the petitioners belong—in the eye of the law is not justified. The discrimination is, therefore, illegal . . ." *Edwards* v. *California*, 314 U. S. 160, 185 (Justice Jackson concurring): "Race, creed or color is a neutral fact—constitutionally an irrelevance."

[62] The United States adopted a resolution presented at the Eighth International Conference of American States at Lima, Peru, in 1938, which read: "1. That in accordance with the principle of equality before the law, any persecution on account of racial or religious motives which makes it impossible for a group of human beings to live decently is contrary to the political and judicial system of America."

[63] George Washington's Letter to Hebrew Congregation, 30 Washington's Letters, Book 19. President Truman's address, 38th Annual Conference of National Association for the Advancement of Colored People, 93 Congressional Record, A3505, *The Washington Post*, June 30, 1947. Report of the President's Committee on Civil Rights, "To Secure These Rights", Executive Order, H9808, December 5, 1946. (11 F. R. 14153).

mons of history demands that the action of the Federal government as evidenced by the Commission and the court below should be repudiated by this Court.

D. Segregation on account of race is contrary to the philosophy of our government.

(1) The Doctrine of "Separate But Equal" Is A Myth.

Equality and equal justice are the order of nature and the law of God upon which the government of the United States rests. Agencies of the government and the courts should not therefore, frustrate the basic design of our original charters of government in the achievement of universal and uniform justice and equality. The real issue is not whether equality can or cannot be attained. The real issue is whether the law which is "what the judges say it is", by sanctioning segregation and discrimination, should assist in making its attainment more difficult, thereby delaying the fruition of the purposes of our government "to form a more perfect union, establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity". "The nations of our time cannot prevent the conditions of men for becoming equal".[64] A nation "conceived in liberty and dedicated to the proposition that all men are equal" cannot long endure either on legal, philosophical or moral grounds if its highest court says equality is unattainable under the law as it is and that it must await congressional action before it can reconsider the false doctrines grafted upon our basic law, namely "separate but equal" and "substantial equality", which were developed solely for the purpose of segregating Negroes on account of their race.

The Declaration of Independence says: "We hold these truths to be self-evident, that all men are created equal,

[64] De Torqueville, "Democracy in America."

that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights governments are instituted among men deriving their just powers from the consent of the governed". We need go no farther. We need no legislation. These self-evident truths are not derived from government but from the minds and wills of the people. They are not matters of geography or politics or race. They come from the natural moral order. They need only to be sanctioned by this court and made equally and fairly applicable to every man. They are the distilled experience and wisdom of the ages unshakably rooted in the moral and religious laws on which our government rests. Our laws proclaim the equality of men.

Federal agencies cannot check the free mobility of Federal citizens in interstate transportation any more than they can check the interchange of ideas. When they single out an individual and compel him to sit in an "assigned space" (R. 265) in enforced privacy, they are guilty of domestic totalitarianism. Negroes like other citizens have the right to free, mutual exchange and intercourse in ideas, in skills acquired at the work bench in an industrial plant, or to seats in a dining car. Such commerce in personal expressions is essential to the American way of life and the exercise of the individual's mind and will in the pursuit of happiness. Governmental action cannot interfere with the right of individuals to "trade their talents in the world." The state has no power over or access to the personal motives, initiatives, and expressions unless they infringe or trespass on others. The function of the state is with public things, the republic and *res publica*.[65]

The question is not whether Negroes as Federal citizens are herded into the hottest corner of the diner at one table, or in a separate dining car with fifty tables because the Commission thinks it is efficient and necessary. It is a question of free use of the mind and will and choice in a

[65] Paul McGuire, "There's Freedom for the Brave," p. 117.

democracy. The central issue is whether the United States as the nexus of the world's moral and political order will practice and apply to all citizens the principles of democracy, quarried out of the solid rock of justice and Christianity by the founders of our Republic, and transmitted by them to posterity. It is a question as old as man, a question of the value of our religious beliefs, of the value and the ineffable dignity of the human personality. These are the questions from which our democracy derives, historically interlocked as it is with religion. Color or race is antithetical to these questions. There is no such thing as separate equality. The idea is a travesty upon religion and democracy.

The Commission allows the railroad to hide under old devices such as to "keep peace and harmony" (R. 170); convenience of railroads (R. 213). What about the convenience and liberties of passengers? Neither the Commission nor the courts as agencies of the Federal government should perpetuate these specious arguments by sanctioning the discriminatory regulation here. To do so is to condone and entrench discrimination based on race. "Disregard of civil liberties by private groups is sometimes understandable. But courts and their officers have special responsibilities to maintain these rights. What they do sets the tone for the whole community. It is in and around the courtrooms of the land, not in the history books, that the vitality of the Bill of Rights is to be found."[66] The universal and inalienable rights which our government is dedicated to maintain are no grants of privilege from the state, conditioned upon the irrelevance of race, color, or creed.

Because the action below was governmental action, inconsistent with the public policy of the United States, the finding of the Commission and the decree of the Court below should be set aside.

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[66] William O. Douglas, "On Being an American," p. 103.

IV. Segregation is Discrimination.

Segregation is discrimination, not only because inequality invariably accompanies segregation, but because the very idea of enforced separation by race casts a stigma upon persons who, by accident of birth, belong to a "race from which there is no way to resign".[67] Discrimination has been defined as "the act of distinguishing; the act of making or observing a difference; distinction, as the discrimination between right and wrong; the state of being discriminated, distinguished, or set apart."[68] A person does not have to be entirely denied a privilege or a right in order to be discriminated against. A discrimination may exist when race is the sole basis for a distinction or differentiation. A carrier discriminates when it differentiates between passengers according to their race and distinguishes between them in accommodations set apart on the basis of race.

The carrier claims it has provided dining car facilities in excess of the number of Negro passengers normally anticipated to seek service. If facilities were provided sufficient to accommodate every passenger, white and Negro, without the necessity of any passenger's waiting for a vacancy in a particular section of the car designated for persons of his race, as long as separate facilities are provided on the basis of race, and though the service provided may be identical in every detail, that differentiation is discrimination. The Report of the President's Committee on Civil Rights states (p. 82):

> We believe that not even the most mathematically precise equality of segregated institutions can be properly considered equality under the law. No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of

[67] Mr. Justice Jackson, dissenting in *Korematsu v. U. S.*, 323 U. S. 214, at p. 243.

[68] Webster's 20th Century Dictionary, p. 485 (1939).

daily living creates inequality by imposing a caste status on the minority group.

In *Railroad Co.* v. *Brown*, 84 U. S. 445, cited but not followed in *Plessy* v. *Ferguson*, a railroad's provision of separate but equal cars for passengers of different races was discrimination. An act of Congress enabling the railroad to extend its road to Washington, D. C. provided "that there shall be no person excluded from the cars on account of color". A Negro passenger, having been ejected from a white coach, was forced to occupy a car set aside solely for Negroes. This "Jim Crow" car, according to the carrier's testimony, was equal in comforts to the other cars. To the contention that the Negro passenger had not been excluded because a separate but equal car had been provided, the Court replied:

> The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but on the contrary, has always provided accommodations for them. This is an ingenious device to evade compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any limited sense. There was no occasion in legislating for a railroad company to annex a condition to its grant of power, that the company should allow colored persons to ride in its cars. This right had never been refused, nor could there have been in the mind of anyone an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carriers—south as well as north—to transport, if paid for it, all persons whether white or black, who should desire transportation. It was the discrimination in the use of cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race should not ride in the cars at all. Congress, in the belief that the discrimination was unjust, acted. It told the company, in sub-

stance, that it could extend its road within the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, must be placed on an equality.

Segregation by carrier regulation, like residential segregation by private covenant, is also an ingenious device which discriminates against Negro passengers, and, in both instances, is designed to accomplish what this Court has held a state cannot do. The Interstate Commerce Act is particularly aimed at discrimination, whatever form it may take. In *U. S.* v. *Milwaukee Refrigerator Transit Co.*, 142 F. 247, the Court stated: "It is manifest that the purpose of the statute regulating interstate commerce is to strike through all pretenses and all ingenious devices to the substance of the transaction, and it is the duty of courts to recognize and carry into effect such purpose in suits for their enforcement".

In dealing with certain property rights the concept of substantial equality or separate but equal has not been applied by this court where property rights are involved and the restraint is based solely on race. If a Negro wishes to buy, sell, or occupy a particular piece of property, this Court has consistently ruled that neither a state nor the federal government may restrict that choice solely because of race, because to do so "is in direct violation of the fundamental law enacted in the 14th Amendment of the Constitution preventing state interference with property rights except by due process of law". *Buchanan* v. *Warley*, 245 U. S. 60, 82. That some choice is left of property substantially or identically equal does not justify a restraint imposed solely because of a person's race or color.

"The Emancipation Proclamation broke the legal bond of slavery but not the social one. The progress of Negro emancipation is infinitely slower and it is not yet accomplished." [69] Negroes still suffer many infirmities that were

[69] Walter Lippman, *Preface to Politics.*

incident to slavery, because of the devastating effects of its successor, segregation. The experience of the United States Army indicates thirty percent illiteracy among Negroes eighty-six years after emancipation. Two-thirds of the Negroes in the south are still disfranchised in defiance of law. Two-thirds of the Negro population of the United States have incomes below the standard of decent living with the consequent over-exposure to disease, crime and death. Four and five tenths (4.5) Negro mothers of every one thousand die in childbirth, compared to one and seven tenths (1.7) white mothers. Ninety-eight Negroes of every one hundred thousand die of tuberculosis compared with thirty-two and seven-tenths of every one hundred thousand whites. In the cotton belt, four million Negroes live in primitive squalor unchanged since 1876. In recreation, in travel, in simple human rights guaranteed under our laws to all alike, this Court should take judicial notice of the violations and deprivals of rights of Negroes beyond those of other groups. "Assigned Space" is enforced privacy which is but another name for the myth of separate but equal, is Herrenvolk and the maintenance of white supremacy which are going down under the rising tide of scientific fact, and the principles of international law and justice.

Mr. Justice Douglas has said: "The sense of belonging is important to man. The feeling that he is accepted and a part of the community or the nation is as important as the feeling that he is a member of a family. When he feels he does not belong, he is not eager to assume the responsibilities of citizenship. Being unanchored, he is easy prey to divisive influences that are designed to tear a nation apart or to woo it to foreign ideology."

The rights here involved, freedom to sit where one pleases, freedom from enforced and humiliating privacy based solely on race which the regulation requires, need no codification or legislation. "Assigned space" in enforced privacy is discrimination.

Color or race is "constitutionally an irrelevance"[70] Separate equality is a travesty upon democracy. To perpetuate such a myth is a dishonest evasion of morals and law. It compels variation for particular persons and sets up one rule for white and Negro, as absurd as one rule for rich and for the poor, for the favorite at court and the countryman at plow.[71] It is a denial of the constitutional heritage of equality and liberty, "only a promise to the ear, to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will"[72]

The enforced privacy of the defendant's regulation connotes a brand of racial inferiority and discrimination under which Negroes suffer as only those who have suffered the loss of the dignity of the human person can understand and appreciate. The moving anguish and humiliation which Negroes suffer is tragic experience.[73]

Segregation based on race is un-American. It is false in law, in science, and in morals. It is contrary to all of our ethical and legal principles and it defies the will of God. This Court should strike the regulation down because it is illegal and because it is ammunition for our foes in our struggle against Communism. While law needs the spiritual backing of the community, law can be and is a positive force in the spiritual advancement of the community. Law to expedite the advancement of the community, to internationalize human rights and universalize equality, need not await the unanimous blessing of the community before it becomes effective. "Law, like the traveler, must be ready for the morrow. It must be a principle of growth."[74]

Legal codes and court decrees tend not only to settle disputes, they are aids to wisdom and to education which are

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[70] Mr. Justice Jackson, concurring in *Edwards* v. *California*, 314 U. S. 160, 185.

[71] John Locke, the Treatises of Government, Book II, Chapter XVIII.

[72] Mr. Justice Jackson's concurring opinion in *Edwards* v. *California*, *supra*.

[73] See Appendix, page —.

[74] Cardoza, "Growth of the Law," p. 61.

deterrents to those community mores and individual prejudices which result in discriminatory practices as are here involved and from which a large segment of Americans have suffered too long. These rights, based on universal and eternal justice, simple human decency and equality are already guaranteed in all our basic law. The recognition, interpretation and reaffirmation of these established rights must be made exquisitely precise like the north star on a moonlit night. Justice Holmes said: "The law is the witness and external deposit of our moral law. Its history is the history of the moral development of the race." The wisdom and enforcement of law are beyond judicial purpose but its lucid interpretation and its constant and courageous affirmation are not. Thus only will the seed of justice and equality for all planted by this court grow into a harvest of moral leadership which will receive the universal assent and acclaim of all men and all nations. And thus only can we avoid repressing freedom which is the chief glory of mankind, the denial of which is to deny and defy the human spirit.

The case at bar requires searching judicial inquiry and a courageous declaration of the rights of free men. In his concurring opinion in *Hurd* v. *Hodge*, 334 U.S. at 36 Mr. Justice Frankfurter squarely met the issue when he said that the petitioner's rights were violated "not for any narrow technical reasons, but for considerations that touch rights so basic to our society, that after the Civil War, their protection against invasion by the states was safeguarded by the Constitution. This is to me a sufficient and conclusive ground for reaching the Court's result." In extending to appellants the protection to which they are entitled this Court, likewise, should appraise reality squarely and not be guided by the technical rules of the law. *Kerr* v. *Enoch Pratt Free Library of Baltimore City*, 149 F. (2nd) 212; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 213 U.S. 287, 61 S. Ct. 552. It is the substance of appellant's rights and the spirit of the American ideals of unqualified

equality and liberty that are important here, not form outmoded, or precedent misused. It is simply a matter of natural, inherent, equal justice under law.

The Court in *Holden* v. *Hardy*, 169 U.S. 366, 18 S. Ct. 383, 385, said: "This Court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; . . . that restrictions which have formerly been laid upon the conduct of individuals or of classes of individuals, had proved detrimental to their interests", and in *West Virginia State Board of Education* v. *Barnett*, 319 U.S. 624, this Court said: "These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence, but by authority of our commissions. We cannot, because of modest estimates of our competence in such specialities as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed."

The judicial function encompasses the duty of guaranteeing as far as it can, those conditions and practices which equiality of treatment and opportunity between individual and government and between individual and individual require. In the history of the development of our legal system and our struggle for justice we have seen exploitation and oppression of minorities crumble under the impact of unchanging, eternal, "self-evident" truths embodied in some of the deathless opinions of this Court. Justice is not the preservation of status quo. Disraeli said: "Justice is truth in action." The inequality, and injustice, based on race alone, of the regulation in this case is invidious under the Constitution and should be destroyed. Equal justice under law for all men however lowly and disadvantaged is the true and final meaning of human experience. The jurist or court which condones, sanctions, justifies or validates inequalities, prejudices and injustices is not a true advocate of justice and frustrates and stultifies the judicial process. "What we seek is not justice under law as it is. What

we seek is justice to which law in its making should conform.'"[75]

The doctrine of equality is the oldest on record. No distinctions are implied from the Mosaic account of Creation to the latest definitions. It is immutably a part of the law of nature, a natural right appertaining to all men in their right of existence, and in their right of action as individuals for their own comfort and happiness which is not injurious to natural rights of others. Natural rights are the foundations of civil rights. As Thomas Hobbes said in his Leviathan, "Nature hath made men so equal that one man cannot, when all is reckoned, claim any benefit to which another cannot pretend." That is also the law of the Gospel.

The central issue in this case arises from a conflict between principles fundamental in our system of government which have not as yet been unequivocally met except in occasional dissent. This case involves not only legal questions which command the critical attention of all who believe that law is really sovereign when it ripens into social justice. Our chief concern should be to equalize social forces in the conflict and "free struggle for life"[76] operating upon Negroes in their attempt to achieve equality. It involves the position of the United States in international leadership. Democratic preachments and democratic practice in the United States are under the spotlight of world scrutiny in the contest of competing and irreconcilable ideologies which compel new judicial inquiry and interpretation of our basic laws and the removal of this intolerable restriction on rights of Negroes.

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[75] Cardoza, Growth of the Law, p. 9.

[76] Mr. Justice Holmes speaking for the court in *Vegelhan* v. *Gunther*, 167 Mass. 92.

CONCLUSION.

A private corporation undertakes to segregate Negroes on a purely racial basis, a basis which has no reasonable relation to the subject matter of the act under which they attempt to make the arbitrary classification. The Commission and court below, representing the government of the United States has sanctioned and condoned this regulation notwithstanding the provisions of the Interstate Commerce Act, and notwithstanding "Our Constitution is color blind". The effect of segregation by private organizations sanctioned by the federal government serves only to imbed the specious separate but equal doctrine in our law, a doctrine which is false and contrary to the philosophy of the founders of our Republic. Negroes have the right to be free from segregation and discrimination because of race, the right without discrimination on account of race to enjoy all the privileges that inhere in freedom, *Hodges* v. *U. S.*, 203 U.S. 1 (1906), and the right of "freedom from outraged feelings as well as restraints on person", *Cummings* v. *State of Missouri*, 4 Wallace (U.S.) 277. The kind of segregation imposed by the regulation is discriminatory just as it is in hotels, theaters, and other public carriers. This type of discrimination, infringing the right of free selection and the right not to be publicly humiliated, cannot be sanctioned by the federal government. *Marsh* v. *Alabama, supra; Shelley* v. *Kraemer, supra.* The enforcement of this regulation by government action is clearly violative of the Interstate Commerce Act, the Constitution and laws of the United States, and principles set forth in more recent decisions than the decision in *Plessy* v. *Ferguson, supra.*

The enforced segregation sanctioned by the Commission and Court below have deprived the petitioner of his inalienable right to liberty and pursuit of happiness, more specifically to any available seat, the same as other passengers. That fact is crystal clear and unequivocal. Identical table cloths and silverware are not the essence of equality. The

identical right of choice of seat, location of table and time of eating such as are available to other passengers, the right not to be set apart and embarrassed on account of race, are the essence of individual rights and liberty. Common honesty compels us to admit the truth of Mr. Justice Harlan's dissent in *Plessy* v. *Ferguson, supra,* "The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds." The only purpose of segregation is to keep Negroes to themselves, in their place.

"How often is natural propensity to society disturbed or destroyed by the operation of government. When the latter, instead of being ingrafted on the principles of the former, assumes to exist for itself, and acts by partialities of favor and oppression, it becomes the cause of mischiefs it ought to prevent."[77]

No amount of technical maneuvers or constitutional ritual can conceal the clear federal action in this case. This court must not allow the separate but equal doctrine further to endure as a yoke around the necks of the American people who want to practice democracy and Christianity if not hampered in that practice by their government. Government classification of citizens on the basis of race is discrimination. Mr. Justice Harlan went to the root of the matter, in the question he put in *Berea College* v. *Kentucky*, 211 U.S. 45:

> Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races?

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[77] Thomas Paine, "Rights of Man," Part II, p. 406.

Our government is a federal republic created for the purpose of making individual advancement easier. Negroes have great faith in their capacity for self government. That faith requires "the assurance that every man shall be protected in doing what he believes his duty against the influence of authority and majorities, custom and opinion."[78] He must be unfettered by status, always inimical to freedom; he must be unhampered by government enforcement of race segregation which will rot the soul of our nation.

WHEREFORE it is submitted that the decision of the court below should be reversed.

Respectfully submitted,

BELFORD V. LAWSON, JR.
JAWN SANDIFER.
MARJORIE M. MCKENZIE.
SIDNEY A. JONES, JR.
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GEORGE H. WINDSOR.

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[78] Lord Acton, "Essay on the History of Freedom in Antiquity."

APPENDIX.

Interstate Commerce Act, 49 U. S. C.

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Sec. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to Chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establish-

ing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 15 (1). Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for investigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chap-

ter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

COLLEGE OF EDUCATION AND INDUSTRIAL ARTS
MAINTAINED BY THE STATE OF OHIO
CHARLES H. WESLEY, PRESIDENT
WILBERFORCE, OHIO

Office of the Administrative Dean

June 11, 1949

Attorney Belford V. Lawson, Jr.
2001 Eleventh Street, N.W.
Washington 1, D. C.

My dear Brother Lawson:

I have before me your letter of May 24, 1949, with reference to my experiences with the jim-crow dining car regulations of the Southern Railway and other roads in the South. I wish to advise that I have never eaten behind the curtain provided in dining cars which separate the tables

where Negroes may eat from the tables where all other human beings may eat. Several times I have had meals served in the pullman car to avoid the humiliation. At other times I have been fortunate enough not to eat at all rather than sit behind the curtain. I have talked to a goodly number of my friends and acquaintances who travel a good deal and I am advised in varying details that to them the separation by the curtain does something somewhat different from other jim-crow experiences they have had. In the first place, it seems so senseless that white persons should be satisfied to be served, by Negro waiters, food that has been cooked and prepared by Negro cooks, but refuse to eat in the same car with other Negroes unless there is some symbol of the inferior status imposed by circumstances over which Negroes themselves do not have control.

In the second place, segregation in dining cars is made overt by the circumstance that all the people in the car are in the same room with an inescapable symbol of the difference in esteem in which Negroes are held by the organized society in which they live and by their governments. It tends to place the colored persons not only at the disadvantage of being segregated and humiliated, but to exhibit his unhappy status to those who pass through or come into the car and those at stations through which the train passes. It is to be noted that the situation here is a little different, though of the same order of unacceptability, from the jim-crow car itself. Ordinarily the better class of both races ride in pullman cars and eat in diners but the badge of race discrimination is burned in by the circumstance that no matter what success in life one has attained, so long as he is of African descent, he must ride behind this curtain of shame. Negro teachers, lawyers, doctors, legislators, judges, and diplomats, no matter what their attainments, are exhibited to the by-standers as separate and different from all other humanity.

I join you with other liberal men and women of this country of all races and nationalities in the fervent hope that the curtain if infamy will be banished by the Supreme Court of the United States.

Sincerely yours,

H. H. Long

HHL:ev

HOWARD UNIVERSITY
WASHINGTON 1, D. C.

May 25, 1949

Department of History
Mr. B. D. Lawson, Jr.
General President, Alpha Phi Alpha
2001-11th Street, N. W.
Washington 1, D. C.

Dear Brother Lawson:

I am delighted to know that definite progress is being made with respect to the validity and reasonableness of the dining car regulations of the Southern railway. In response to your request I am submitting the following statement which you may use in any way you deem best:

Dr. Rayford W. Logan, officer of the United States Army in France in World War I, head of the Department of History at Howard University, world traveller, author of several books and member of the United States, National Commission for UNESCO, states that the regulation which compels him to eat behind a curtain or partition in a dining car is the most humiliating and degrading experience in his entire life in the United States. He further states that by training and temperament it is impossible for him to be a communist but if there were any one thing in American society that would lead him to communism, it is the impact of the insult to his dignity as an individual arising from the dining car regulations.

I hope that this statement will strengthen your case and that you will receive many others like it.

With all good wishes for your successful prosecution of this case, I am,

Sincerely yours,

RAYFORD W. LOGAN
Head, Department of History

Mary McLeod Bethune
Founder-President

Jeanetta Welch Brown
Executive Director

NATIONAL COUNCIL OF NEGRO WOMEN, INC.

(Affiliated with the National Council of Women of the United States, Inc., and International Council of Women of the World)

1318 Vermont Avenue, Northwest
Washington 5, D. C.
Telephone: COlumbia 4491

June 9, 1949

Mr. B. V. Lawson, Jr.
Alphi Phi Alpha Fraternity, Inc.
2001 11th Street, N. W.
Washington 1, D. C.

My dear Mr. Lawson:

During my extensive travels throughout the South I have encountered a variety of experiences demonstrating the discriminatory character of dining car segregation. This practice is offensive to me as an American citizen and as a member of the racial minority group with which I am identified. Naturally, I share with other Negroes the feeling of personal resentment induced by the knowledge that the partition is deliberately designed to imply the superiority of one group and the inferiority of another.

Since it is absurd to assume that facilities provided on this basis can possibly be equal, the practice purely demonstrates a situation in which expenditure of the same sum of money by Negroes does not buy the same facilities, service, and comfort available to others, and represents one of the most grossly unfair aspects of American racism.

There is, of course, a wide variety of reactions on the part of Negroes to this treatment. Many, revoiling from the personal humiliation to which this practice subjects them, forego the privilege of dining car service to which their ticket entitles them. Others face the experience only to emerge with extreme bitterness, frustration and anger, accentuating within them feelings of racial animosity. Those of us, however, who regard manifestations of racism as symptoms of an insidious malady tend rather to be embarrassed for our fellow citizens on the other side of the "curtain" and the flagrant violation of our democracy. Knowing as I do that the majority of decent American people are inwardly shamed and spiritually frustrated by their reluctance to cope with this flagrant violation of their own finer instincts of fair play and Christian ethics, my deepest emotions in situations of this kind are essentially compassionate.

Sincerely yours,

MARY MCLEOD BETHUNE
Founder-President

Women United . . . "A Magazine Dedicated to all Women Everywhere"

FEDERAL HOUSING ADMINISTRATION
RACIAL RELATIONS SERVICE
2011 North Washington
Dallas 4, Texas

June 1, 1949

Attorney Belford V. Lawson
2001 Eleventh Street, N. W.
Washington 1, D. C.

Dear Sir:

I understand that the Alpha Phi Alpha Fraternity is prosecuting the case of Elmer Henderson vs. United States, et al, in an effort to eliminate the vicious practices of Southern Railroads which require Negro passengers, who seek dining car accommodations, to be served at a table set off by curtain or partition. As one who travels extensively in the interest of the Government I wish to make some comments.

I have been exposed to these conditions many, many times and have never enjoyed equality in service at any time, while seated behind this curtain. Usually these four seats behind the curtain are occupied by whites because of overflow and conjestion while there may be a single seat available elsewhere in the dining car. In the next place, the humiliating inconvenience and discomfort of such separate seats create mental anguish that often affects the gastronomical system. In addition, when these separate seats are not in use by whites during the early period of the meal, the dining car employees occupy them and leave them, usually, in complete disorder.

Because of the discomfiture of such separate eating facilities on most Southern Railroads, many times I deny myself the privilege of a meal, rather than to engage in controversy with the Railroad employees in search of an available seat elsewhere in the dining car.

I am sure that if these facts are presented to the Court they will see that there is no equal protection in these accommodations and will invalidate this nefarious practice.

A. MACEO SMITH
Racial Relations Adviser

AMS/hwb

LINCOLN UNIVERSITY
PENNSYLVANIA

May 26, 1949

Office of the President

Attorney Belford V. Lawson, Jr.
General President
Alpha Phi Alpha Fraternity, Inc.
2001 Eleventh Street, N. W.
Washington 1, D. C.

Dear Mr. Lawson:

I am glad to learn from your letter of May 24, that the Alpha Phi Alpha Fraternity is prosecuting the case of Elmer Henderson v. United States.

As you may know, I have held positions during the last twenty-five years that have required me to travel widely in the South. One of the reasons that led me to give up what I still regard as a serviceable career in the field of educating Negro youth in that section, was the constant series of demoralizing humiliations to which I was exposed in the dining cars.

I remember one trip from Atlanta to Chicago with Mr. Forrester B. Washington in 1943. On that trip Mr. Washington and I were obliged to stand waiting in the vestibule from near Atlanta to well beyond Chattanooga, waiting for a seat behind the velvet curtain while for a majority of the time the rest of the dining car was practically empty.

The human degradation of sitting down to such a table, and having the stewart contemptuously draw the curtains

so as to hide one's face from the other diners, as though the color in your skin constituted some kind of contagion, or was likely to provoke nauseau, is of such a character that it cannot be described to anyone who has not experienced it.

Indeed, so humiliating is this experience, that I found myself in time unable to eat under such conditions, and I have traveled for hundreds of miles rather than to expose myself to such a practice, so degrading to every rightful concept of the dignity of the human person in the sight of man and God.

Whatever the outcome of your suit, I am thoroughly convinced that you are working in the interest of true Americanism, and for the dawning of that day when this great nation can set forth to the world an example of respect for human personality as convincing as the public utterances of our statesmen in the councils of the United Nations.

Sincerely,

HORACE M. BOND.

HMB/gj

VIRGINIA STATE COLLEGE
PETERSBURG, VIRGINIA

May 26, 1949

President's Office

Honorable Belford V. Lawson, Jr.
2001 Eleventh Street, N. W.
Washington 1, D. C.

Dear Honorable Lawson:

Time and time again my associates in the field of education with mutual interests and concerns, travelling to and from conferences, conventions, and board sessions are humiliated by regulations requiring separation because of racial origin. Essential communication in the work of education and in other areas is too frequently blocked by

this kind of brutalizing practice. It would be beneficial to the democratic spirit of this land, and to the peoples of all lands who observe us, if this artificial barrier toward normal human understanding and citizenship relations could be once and for all time abolished in the dining cars of our railway carriers.

The one important factor that both "separate but equal" and "substantial equality" overlook is the psychological impact of being forced to assume an air and attitude of restricted privacy in an otherwise publicly-atmosphered dining car situation. It seems clear to me as a citizen, a Southerner, and an educator that there is no reason for this continued anti-social practice. May it be eliminated by a favorable court decision.

Sincerely yours,

L. H. FOSTER,
President.

LHF/bvh

SHAW UNIVERSITY
RALEIGH, N. C.

May 26, 1949

Office of the President

Attorney B. V. Lawson, Jr.
2001 Eleventh Street, N. W.
Washington 1, D. C.

Dear Mr. Lawson:

I certainly hope that you may be successful in the case in which the validity and reasonableness of the dining car regulation requiring Negro passengers to be served only at certain tables is being contested. As one who travels a great deal, I have to use the dining car most frequently.

The inconsistency of the situation is indicated when on occasion I had lunch in the dining car in the North and later that same day had dinner in the South in the re-

stricted part of the dining car, being served by the same steward and staff in both cases.

On occasions there have been instances when the necessity of sitting on the side of the car with the sun on the table or the shades drawn to prevent the sun from shining has been necessary because the other table for Negroes has been occupied. At the same time, there has been space in the dining car on the shady side but in which I would not be allowed to sit because of the present regulation.

The circumstances have also made it so that frequently Negroes have been crowded at the tables limited to them when there has been additional space for a person to have much more elbow room if the opportunity of eating at more and different tables was extended.

Of course there is the significant factor of difference to indicate that there must be something of contagiousness or undesirable features which means that the Negroes must be grouped in one place, removed from the other passengers in the car. One can certainly not eat in full enjoyment of a meal under such circumstances.

With every good wish, I am

Very truly yours,

ROBERT P. DANIEL,
President.

RPD:p

Buckling Moon—Without Magnolias, pp. 49, 50, 133, 134, 135, 136 (1949), by Doubleday & Co., Inc.

These tragic experiences have gotten into the literature of the era. The effect of segregation on a Negro passenger has been described thus:

"He wondered idly what Ethel had put in the box of lunch for him to eat that evening. He had eaten lunch before he had come to the station. He could, of course, have gone into the dining car that evening, but *of all the*

forms of segregation, the green curtain used to shut off Negroes from the other diners seemed to him the most odious. The few times that he had tried to eat under such surroundings he had found that he was unable to enjoy his food. In fact he had been scarcely able to force the food down his throat and had merely sat there feeling his resentment churning around inside him and finding it almost impossible to restrain it. It made him hate every white face in the dining car, and the last time that this had happened it had made him so nervous that he had quickly left enough money to cover the cost of what he had ordered, plus a tip, and gone back to his compartment, leaving his food untouched."

The experience of another passenger was related as follows: "She went into the diner early, the moment that the waiter stuck his head in the car and announced first call for breakfast. It would be a change from the dingy coach, and, by doing so, she hoped that she would be able to eat by herself. She might even finish before it was necessary to pull the green curtains shutting off the two end tables, which were reserved for Negroes, from the rest of the car.

"She was the first one in the dining car, but as she sat down at the smaller of the two tables the curtain was already drawn, though there were no white people there. Annoyed, she looked down toward the opposite end of the diner, but the steward carefully ignored her, pretending to be busy with his stack of menus. She stared out of the window angrily. • • •

"She was hungry. The evening before, she had eaten in the Washington station rather than undergo *the bother and possible humiliation of the dining car.* But it had been an unsuccessful meal, for although she knew that the train stopped there for forty minutes while it took on additional southbound cars, she was all too conscious of the big clock over the entrance. She was glad that she had not allowed her friends in Washington to come down to

the train to see her; it would only have added to the confusion and made her still more conscious of the fact that here was the starting point of legal segregation. Consequently she had hurried through her meal so quickly that nothing had had a taste of its own; it all was merely something thrown hastily into her stomach to fight off the pangs of hunger.

"The drawn green curtain was at her back, but she was as conscious of it as though she were facing the other way.

"'Couldn't you draw back the curtain?' she asked politely.

"He bent forward and looked out the window.

"'This is Georgia, baby,' he said, 'or didn't you know?'

"'I know that,' she answered, 'but there's no one in here except me.'

"'Look,' he said, 'I don't make the rules.'

"'Then couldn't you ask the steward?'

"'That peck back there don't make the rules either. Anyway, that man's really Simon Legree and he ain mellowed none in the years. Honest, lady, that man is pure evil and there ain a thing I can do.'

"'Not even ask him?'

"'Unh-unh, baby, not even for you. I ask him anything this early in the morning he bite my arm off. I always stay short of him, but until noon I avoid him completely''.

"She shrugged and drank her orange juice, then poured a cup of coffee. It was good, strong the way she liked it. She was conscious of the steward passing and she called out to him.

"'Couldn't you draw back the curtain behind me?'' she asked. 'It cuts off the light and it's really most unpleasant.'

"He turned around and looked at her.

"'The laws of this state are that colored patrons must eat behind that curtain,' he said. 'I don't make those rules, I merely carry them out.'

"'I know that,' she said. 'I'm not blaming you, but since I am the one person in here—'

"'I'm not interested in what you think,' he broke in.

"'I merely—' she protested.

"But he gave her not time to finish. 'I don't care what you merely,' he said. 'If you don't like it, you can leave now. I won't charge you for the orange juice and coffee.'

"She wished now that she had kept her mouth shut. At the other end of the car she saw some white people entering and she hated scenes, but she was in so far now that she could not possibly withdraw without making her position clear.

"'All I ask is a little courtesy,' she said slowly. 'I've done nothing to deserve abuse.'

"'You want me to call the conductor? He'll put you off at the next whistle stop, if that's what you want. Or would you rather talk to a policeman in Jacksonville? I don't have the time nor the patience to argue with you. If you don't like the way we do things down here why didn't you stay up North?'

"He turned abruptly and walked past her down the aisle to where the white people were waiting. She felt the tears rise to her eyes and the sting of his words across her face like a lash. In a moment she knew that she was going to cry and, like a wound-up mechanical toy, once started, she would stop only when she had run down. Blindly she got up from her chair and hurried out of the car."